IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1351

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Petitioner,

v.

JOHNS-MANVILLE PRODUCTS CORPORATION
and
NATIONAL LABOR RELATION BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JERRY D. ANKER
WALD, HARKRADER & ROSS
1320 Nineteenth Street, N.W.
Washington, D.C. 20036

JOHN R. TADLOCK
JAMES J. CRONIN
P. O. Box 2812
Denver, Colorado 80201

VICTOR H. HESS, JR.
DENNIS M. ANGELICO
HESS & WASHOFSKY
1411 Decatur Street
New Orleans, Louisiana 70116
Counsel for Petitioner

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Petitioner requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 19, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 557 F.2d 1126 and reprinted in Appendix A (1a). The Decision and Order of the National Labor Relations Board,

including the Decision of the Administrative Law Judge, are reported at 223 N.L.R.B. 1317 and reprinted in Appendix D (50a).

JURISDICTION

The judgment of the Court of Appeals (Appendix B) was entered on August 19, 1977, and petitions for rehearing were denied on October 26, 1977 (Appendix C). By an order dated January 13, 1978, Mr. Justice Powell extended the time for filing a petition for certiorari to and including March 25, 1978. This Court's jurisdiction to review the judgment below is based on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the occurrence of some disruption of an employer's operations during collective bargaining negotiations constitutes an "in-plant strike" which permits the employer to hire permanent replacements for *all* union-represented employees, where there is no proof and no finding that all or even a substantial number of such employees engaged in any disruptive activities.

2. Whether an employer that has locked out its employees in connection with a collective bargaining dispute may permanently replace such employees with new hires.

STATUTES INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides in pertinent part as follows:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Section 8 of the National Labor Relations Act, 29 U.S.C. § 158, provides in pertinent part as follows:

> (a) It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees . . . .

STATEMENT OF THE CASE

Petitioner Union was the collective bargaining representative of approximately 107 production and maintenance employees at the New Orleans plant of respondent Johns-Manville Products Corporation. On September 11, 1973, the Union and the Company commenced negotiations for a new collective bargaining agreement, to replace one which was due to expire on October 12, 1973. The negotiations were unsuccessful, due largely to the Company's insistence upon certain proposed changes in the prior agreement, particularly one which would have deleted a provision requiring the Company to train its own employees to fill mechanical positions rather than hiring mechanics from outside.

On October 31, 1973, the Company announced that the plant would be shut down until an agreement was reached. Two weeks later, on November 14, the Company resumed production with temporary replacements, consisting of

employees from its other plants, supervisors, and some newly-hired temporary employees. Thereafter, in April 1974, the Company began to hire permanent replacements. Although negotiations with the Union were continuing during this period, the Company did not inform the Union in advance of its decision to hire permanent replacements, nor did it bargain with the Union concerning this action. Ultimately all of the former employees were permanently replaced.

The Company contended that its decision to close the plant on October 31, and its subsequent decision to permanently replace the entire workforce, were prompted largely by acts of sabotage which it claims were committed by employees during September and October 1973. The Administrative Law Judge who heard the evidence made extensive findings with respect to this issue, which were adopted in full by the NLRB and left undisturbed by the Court of Appeals.[1] These findings may be briefly summarized as follows:

The Company's plant manufactures dried felt, a crude form of paper which is used as the base for asphalt roofing materials. This product is made from a slurry of paper, pulpwood, and water, which is first compressed to form a sheet capable of supporting its own weight, then processed across a conveyor belt onto dryer drums or rollers until most of the remaining moisture is removed, after which it is wound on a reel and cut into rolls. In the course of this process, the sheets sometimes break, either because of a maladjustment in the rollers, a defect in the slurry mixture, or foreign objects in the equipment. The sheets can also easily be broken, deliberately or accidentally, by hand. In addition, the rollers and other equipment sometimes break down due to the presence of scrap metal or other foreign objects.

[1] The Court of Appeals stated: "We agree with the factual findings of the Administrative Law Judge and the Board, but not with the conclusions they reached." (12a.)

Although paper breaks and equipment malfunctions occur quite regularly, the Company claimed that such incidents occurred with excessive frequency during periods of collective bargaining negotiations, both in the past and in 1973. There was evidence that there were more paper breaks than usual in September and October.[2] In addition, in early October "the Respondent found that a 2,300-volt switch had been disconnected causing a shutdown of the mill. During this same period there were also some maladjustments in the dryer sections, as well as damage to a cylinder wire which appeared to have been clearly and sharply cut . . . ." (77a). Because of these problems, the Company laid off its production force from October 12 through 21, to enable its maintenance employees to inspect and repair all equipment (51a). Shortly after production was resumed, "[o]n October 22 or 23, 1973 all three defibrators were inoperable because heavy foreign materials were lodged between the segments within the equipment . . . ." (78a.) On the same day, there was also an unsually high incidence of paper breaks, "resulting in the production of only 13½ tons of paper as compared to a normal day's production of 110 to 120 [tons]." (78a.)

The Company did not conduct any investigation to determine which (if any) of its employees were responsible for these incidents, nor did it make any effort to obtain an investigation by law enforcement authorities. At the NLRB hearing, it "did not introduce any evidence which identified any employee who was even alleged to be responsible for such activities." (97a.) Nevertheless, it

[2] The Court of Appeals also referred to the fact that "[a]n inordinate number of paper breaks occurred on or about August 21 or 22, 1973 which were the result of improper adjustment of dryer section controls." (4a.) Although the Company suggested, and the court seemed to infer, that this incident was related to the negotiations, this seems highly unlikely since the negotiations did not even commence until three weeks later, on September 11.

contended that the disruptions were the result of deliberate, concerted action by the employees.

The Administrative Law Judge found, however, that the evidence was "insufficient to support a conclusion and finding that Respondent's employees were engaged in concerted improper conduct." (97a.) He pointed out that paper breaks can be "caused by several unintentional factors as well as by intentional acts," and that the frequency of such events was sometimes "erratically unstable" even during nonnegotiating periods. (98a.) He further found that, even if sabotage could be inferred from the evidence, "such activities could have been carried out by a single individual, acting on his own behalf and not on behalf of, or in concert with, other employees or the Union." (99a.) He noted that the Union had not "advocated, initiated or condoned" any disruptive activities. (99a.)

The Decision of the NLRB

Both the Administrative Law Judge and the Board held that the Company had the right, after reaching a bargaining impasse, to lock out its employees, and that it also had the right to operate its plant during the lockout with temporary replacements.[3] They further held, however, that when the Company hired permanent replacements it violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act. Such action, the Board held, was "inherently discriminatory and destructive of said employees' protected rights" (103a), "completely destroyed the bargaining unit" and "constituted a withdrawal of recognition" of the Union. (52a-53a.) The Board emphasized that the Company "did not have reasonable and sufficient objective considerations upon which to conclude that 'any or all of its employees' were engaged in improper conduct so as to justify discharge of all production employees." (53a.)

[3] Board Member Jenkins dissented from the holding that the Company had the right to utilize temporary replacements during the lockout. On the basis of his dissenting opinion in various prior cases and the Seventh Circuit's decision in *Inland Trucking Co.* v. *NLRB*, 440 F.2d 562 (7th Cir.), *cert. denied*, 404 U.S. 858 (1971), he would have held that even the temporary replacement of locked-out employees is prohibited by Sections 8(a)(1) and (3) of the Act. (56a-59a.)

The Decision of the Court of Appeals

A divided Court of Appeals (Judge Wisdom dissenting) reversed the decision of the Board. The majority held that "as a matter of law, the employees were involved in what amounted to an in-plant strike" (12a), and that the employer therefore had a right to hire permanent replacements in accordance with the well-established rule that "strikers" can be permanently replaced. The court found it unnecessary to reach the question of whether an employer may permanently replace locked-out employees.

Judge Wisdom, in dissent, emphatically rejected the majority's conclusion that there was an "in-plant strike." He pointed out, *inter alia*, that there was "less than one additional paper break per shift during August through October 1973" (20a), that excessive paper breaks had also occurred "in January, May, and July of 1973, long before any negotiations" (20a), and that with the exception of a single day—October 22—production during the period of the alleged "strike" ranged from 104 to 112 tons per day, very close to the normal average of 110 tons per day. (22a.) He also demonstrated that the evidence fully supported the Board's finding that all of the incidents of disruption, if they were caused by employees at all, could have been caused by only "one or two or a handful of workers." (24a.)

The dissent further argued that the majority's decision was contrary to all precedent. Sabotage of an employer's

operations, Judge Wisdom pointed out, is not a "strike" but an unprotected activity, and the employees engaging in such activity may be fired or otherwise penalized, not merely replaced. The prior cases uniformly hold, however, that such action may be taken only against those employees who have been shown to have engaged in the improper activity. (25a-28a.)

The majority's holding, the dissent said, "has given employers a lethal new tool to combat future unionization and to avoid the process of collective bargaining. . . . Companies will be encouraged to thwart bargaining and unionization by visiting the sins of the few on the many, causing unemployment on those who seek to exercise their section 7 rights." (30a.)

Having rejected the basis for the majority's opinion, the dissent found it necessary to reach the question of whether an employer who locks out his employees may thereafter permanently replace them. After a lengthy analysis of the facts and applicable legal principles, the opinion concluded that such permanent replacement was unlawful under Sections 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1), (3). (31a-46a.)

REASONS FOR GRANTING THE WRIT

I.

Certiorari is warranted in this case to review the unprecedented holding of the Court of Appeals that evidence of participation by some employees in disruptive activities permits the permanent replacement of the entire workforce. This startling decision is in conflict with all prior cases, including decisions of this Court and many courts of appeals. Unless reversed, the decision will cause conflict and confusion—and foster litigation—in an area of the law which has long been regarded as settled, and will encourage employers to use the misconduct of

some employees as a pretext for depriving all others of the rights guaranteed by the National Labor Relations Act.

The problem presented in this case is a recurring one, since unlawful conduct, including violence and destruction of property, is unfortunately not an uncommon occurrence on the American labor-relations scene. Cases dealing with such conduct—both by employers and by employees—are legion. But no court has ever previously held that an employer may terminate or permanently replace all of his employees because of the misconduct of a few. As the dissent below pointed out, the majority cited "no section of the Act, no decision of a court, no holding of the Board, and no argument of labor policy in support of its conclusion. There is no citation because no supporting case exists." (24a-25a.)

In *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), this Court held that an employer may discharge employees who engage in unlawful or "unprotected" activities—in that case, the seizure and physical occupation of the employer's buildings. But the Court made clear that only the actual perpetrators of the offense could be dismissed. The Court spoke of the employer's "right to discharge *the wrongdoers* from its employ," "to discharge *those responsible* for the unlawful seizure." 306 U.S. at 254 (emphasis added). Similarly, in *NLRB* v. *Local 1229, IBEW*, 346 U.S. 464 (1953), the Court sustained the discharge of nine employees who had engaged in unprotected conduct, but held that a tenth employee had been improperly discharged because he had not participated in the offense. And in *NLRB* v. *Insurance Agents*, 361 U.S. 477, 493-94 (1960), the Court noted that an employer "could have discharged or taken other appropriate disciplinary action against the employees *participating* in these 'slow-down,' 'sit-in,' and arguably unprotected disloyal tactics." (Emphasis added.)

Consistently with these cases, the courts of appeals have uniformly held that only those employees who are shown to have been guilty of unlawful or unprotected activities may be terminated. "Certainly all the employees should not be deprived of the benefits of the Act because certain undisclosed ones forfeited their rights." *Stewart Die Casting Corp.* v. *NLRB*, 114 F.2d 849, 856 (7th Cir. 1940), *cert. denied*, 312 U.S. 680 (1941). An employer may not discharge employees "who took no part in the disturbance." *NLRB* v. *Clinchfield Coal Co.*, 145 F.2d 66, 72 (4th Cir. 1944). The violent conduct of some employees "is not . . . to be imputed to other union members in the absence of proof that identifies others as participating in such violence." *NLRB* v. *Mt. Clemens Pottery Co.*, 147 F.2d 262, 268 (6th Cir. 1945). "An act of violence by a participant in a strike may not be imputed to others generally or to the union in the absence of a showing of agency, ratification, counselling, incitement, or other form of participation in the act of violence by others or by the union." *NLRB* v. *Sea-Land Services, Inc.*, 356 F.2d 955, 966 (1st Cir.), *cert. denied*, 385 U.S. 900 (1966). Employees have "no obligation to disavow misconduct which they did not initiate and with which they are not shown to have been connected," and their failure to do so "provides no rational basis for inferring that they acquiesced in the wrongs of others with whom no agency relationship is shown." *International Ladies Garment Workers* v. *NLRB*, 237 F.2d 545, 552 (D.C. Cir. 1956). "The law is settled that an employee's disqualification for reinstatement must be based upon evidence that he personally participated in misconduct." *NLRB* v. *Wichita Television Corp.*, 277 F.2d 579 (10th Cir.), *cert. denied*, 364 U.S. 871 (1960). See also *NLRB* v. *Cast Optics Corp.*, 458 F.2d 398, 406 (3d Cir.), *cert. denied*, 409 U.S. 850 (1972); *NLRB* v. *Valley Die Cast Corp.*, 303 F.2d 64, 67 (6th Cir. 1962); *NLRB* v. *Ohio Calcium Co.*, 133 F.2d 721, 726 (6th Cir. 1943).

The decision below is squarely in conflict with all of these cases. It is also in conflict with a fundamental principle of our jurisprudence—namely, that only the guilty may be punished. To be sure, one consequence of that principle is that wrongdoers who cannot be identified will go unpunished. But our system has always preferred that result to the imposition of communal guilt and the punishment of the innocent.

Aside from being in conflict with precedent and basic juridical principles, the decision below can only have mischievous results. It would encourage employers, instead of seeking to identify and punish wrongdoers, to use the occurrence of any misconduct as a basis for depriving innocent employees of their statutory rights. Even in this case, the Company made no effort to find out who was responsible for the disruption, perhaps because it preferred to use it as a means of ridding itself of an unwanted union. If the law permits this result, employees who would otherwise refrain from improper conduct might be tempted to participate, since they would be subject to punishment whether they did so or not.

We believe the decision below is so plainly wrong that this Court should reverse it summarily, without further briefs or argument. But in any event, the issue presented is sufficiently important and recurring, and the decision so squarely in conflict with prior precedent, as to require review by this Court.

II.

A separate question presented by this case is whether, quite apart from any disruption, an employer may hire permanent replacements for employees who have been locked out because of a collective bargaining dispute. In *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965), this Court held that it is not a violation of the

National Labor Relations Act for an employer to lock out its employees after a bargaining impasse, but expressed "no view whatever as to the consequences which would follow had the employer replaced his employees with permanent replacements or even temporary help." 380 U.S. at 308 n.8. In a companion case, *NLRB* v. *Brown*, 380 U.S. 278 (1965), the Court held that it was not unlawful for a group of employers to utilize *temporary* replacements during a lockout instituted as a "defensive measure" in response to a whipsaw strike. But *Brown* did not hold that *permanent* replacements could be used even in that circumstance, see 380 U.S. at 292 n.6; *id.* at 293 (concurring opinion of Mr. Justice Goldberg), and *American Ship* left open the question whether even temporary replacements could be used if the lockout is "offensive" rather than "defensive" in character—i.e., if its purpose is to bring economic pressure on the union and the employees, rather than to counteract pressure brought by the union.

This appears to be the first case which has raised the permanent-replacement issue, although there have been several cases since *Brown* and *American Ship* involving temporary replacements. The Board initially held that the use of temporary replacements during an offensive lockout was unlawful, and its decision was affirmed by the Seventh Circuit. *Inland Trucking Co.*, 179 N.L.R.B. 350 (1969), *enforced*, 440 F.2d 562 (7th Cir.), *cert. denied*, 404 U.S. 858 (1971). After a change in the membership of the Board, however, a conflict in views developed, with two new members (Kennedy and Pennello) taking the position that the use of temporary replacements is permissible, two old members (Fanning and Jenkins) adhering to the *Inland Trucking* view that such use is not permissible, and the fifth member (Chairman Miller) taking the position that each case must be decided on the basis of its own facts and circumstances. See *Ottawa Silica Co.*, 197 N.L.R.B. 449 (1972), *enforced*

per curiam, 482 F.2d 945 (6th Cir. 1973); *Inter Collegiate Press*, 199 N.L.R.B. 177 (1972), *enforced*, 486 F.2d 837 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974); *WGN of Colorado, Inc.*, 199 N.L.R.B. 1053 (1972); *Hess Oil Virgin Islands Corp.*, 205 N.L.R.B. 23 (1973); *Sargent-Welch Scientific Co.*, 208 N.L.R.B. 811 (1974).

Despite these conflicting views concerning temporary replacements, the Board had no difficulty deciding in this case that the permanent replacement of locked-out employees was unlawful. As the Board noted, such action utterly destroyed the employees' right to bargain collectively, since the consequence of their exercise of that right was the loss of their employment.[4] Although we believe the Board's decision was clearly correct, the issue is of such fundamental importance that it should be definitively settled by this Court. Furthermore, the Court's decision would also tend to shed light on the more difficult issue of whether locked-out employees may be temporarily replaced, as to which the cases are now in conflict.[5]

We recognize that this Court sometimes prefers not to review an issue which was not decided by the Court of Appeals. Thus, the Court may conclude that the question of whether an employer has a right to hire permanent replacements for locked-out employees is not yet ripe for

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[4] As this Court has held, employer actions which are "inherently destructive" of rights guaranteed by the Act are unlawful regardless of the employer's subjective motive. See, e.g., *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963).

[5] The temporary-replacement issue is not directly presented here, since the Union did not seek review in the Court of Appeals of the Board's holding that the employer's use of temporary replacements in this case was not unlawful. However, any decision by this Court on the permanent-replacement issue would tend to clarify the law as to temporary replacements as well.

review, since it was not decided by the court below. In that event, we urge the Court to grant certiorari with respect to the other issue in the case, and if the judgment below is reversed, to remand the case to the Court of Appeals for consideration of the remaining issue.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted, and the judgment below should either by summarily reversed or the case set for plenary consideration of one or both of the issues presented.

Respectfully submitted,

JERRY D. ANKER
WALD, HARKRADER & ROSS
1320 Nineteenth Street, N.W.
Washington, D.C. 20036

JOHN R. TADLOCK
JAMES J. CRONIN
P. O. Box 2812
Denver, Colorado 80201

VICTOR H. HESS, JR.
DENNIS M. ANGELICO
HESS & WASHOFSKY
1411 Decatur Street
New Orleans, Louisiana 70116
Counsel for Petitioner

March 24, 1978

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 76-2444

JOHNS-MANVILLE PRODUCTS CORPORATION,
Petitioner-Cross Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

Aug. 19, 1977

Rehearing and Rehearing En Banc
Denied Oct. 26, 1977

* * * *

Before WISDOM, GEE and FAY, Circuit Judges.

FAY, Circuit Judge:

This case is before the Court on a petition for review and to set aside an Order of the National Labor Relations Board and on a cross-application by the Board seeking enforcement of its Order. The Board affirmed the findings and conclusions of the Administrative Law Judge and adopted his Order in its entirety,[1] holding that the petitioner, Johns-Manville Products Corporation, violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act [the Act], as amended, 29

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[1] The Board's Decision and Order are reported at 223 NLRB No. 189 (1976).

U.S.C. § 151 et seq.,[2] by unilaterally hiring permanent replacements for employees who had been lawfully locked out. As a remedy, the Board ordered, in addition to cease and desist provisions,[3] that the Company reinstate the one hundred and seven locked out bargaining unit employees with back pay and, upon request, to bargain with the Oil, Chemical and Atomic Workers International Union, AFL-CIO [the Union]. After carefully examining the record, this Court [4] finds that the Board erred in its conclusions. Therefore, we set aside the Board's Order and decline to enforce it.

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[2] The pertinent statutory provisions are as follows:

29 U.S.C. § 158 [§ 8, National Labor Relations Act]

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title . . . .

[3] "The Johns-Manville Products Corporation, Respondent herein, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees in regard to hire or tenure of employment, or any term or condition of employment because of protected concerted activities.

(b) In any other manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act except to the extent that such rights may be effected by lawful agreements in accord with Section 8(a)(3) of the Act."

[4] This Court has jurisdiction under Section 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. § 160(e) and (f).

THE FACTS

The petitioner is engaged at its New Orleans plant in the manufacture of "organic felt," which is a crude form of paper used as a base for asphalt roofing products which the Company produces at its plants in Georgia, Louisiana and California. The procedure for making organic felt consists of a series of steps by which the two basic raw materials, waste wood chips and waste paper, are decomposed, blended with water, and then dried out to finally form paper sheets. Breaks in the paper, especially while still a damp "web", can be caused by striking the water mixture (the "slurry") or the finished sheet with one's finger or an object, or by changing the proper revolutions per minute of the rollers in the various dryer sections. Damage can also be caused by improperly adjusting the valves controlling the blending of paper and wood slurry stock. The evidence shows that sabotage in all these forms can be carried on surreptitiously, making it difficult if not impossible to observe the guilty individual or individuals.[5] Further, the large size of the physical plant precluded constant surveillance of the operations.[6]

After this Company purchased the New Orleans plant in 1964, the Union was certified by the Board as the unit employees' exclusive collective bargaining representative.[7] Since that time, the Company and the Union have entered into four successive two-year contracts, the latest of which

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[5] Government witness St. Angelo testified that the sheets, particularly at the point just in front of the dryer section, can easily be broken and that this can be done without others in the vicinity observing it.

[6] The operations are housed in five separate buildings having a total of approximately forty thousand square feet of floor space and are conducted by three shifts of employees per day.

[7] A substantial number of these employees had worked for the former owner of the plant, Flintkote Company, and had been represented by the Union since 1947.

was due to expire on October 12, 1973. Negotiations began in September 1973, following the Union's service of its 60-day notice of termination of contract. The parties met several times for the purpose of negotiating a new collective bargaining contract, but the parties could not agree in several areas.[8]

Prior to and during the negotiation period, the Company experienced an unusual amount of production disruption which became more widespread and serious as negotiations progressed. An inordinate number of paper breaks occurred on or about August 21 or 22, 1973 which were the result of improper adjustment of dryer section controls. On August 23, Darrell Wells, the Company's Employee Relations Manager for the New Orleans plant, telephoned Ernest Rousselle, the Union's International Representative, and informed him of this problem. Wells said this type of activity could "only hurt negotiations" and that the plant was not going to continue to operate and make scrap. Rousselle replied that he would check with Local Union officials and get back to him. However, Rousselle did not contact Wells on this subject and the next time it was discussed was at a bargaining meeting held about two months later on October 3, 1973.

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[8] Apparently the most controversial proposal by the Company would have permitted it to hire mechanics from outside the bargaining unit, relieving it of the obligation to train maintenance department employees to do mechanics' work. The Company urged this proposal, contending that the lack of sufficiently trained maintenance people was affecting its maximum productivity. The Union opposed this change because it believed that senior maintenance employees would be laid off in favor of less senior, but more skilled mechanics hired from the outside. The parties also disagreed on the duration of a new contract and a wage increase, the Company suggesting a three year contract and conceding to a 17, 20, and 25 cent wage increase per year, and the Union asking for a one year contract with a 30 cent wage increase each year. Further, in addition to other proposals from each side, the Company wanted to delete a no-strike, no slowdown, no work stoppage, and no lockout clause, and the Union wanted increased fringe benefits.

From September 1 through October 22, 1973, according to the record, the number of paper breaks during production periods was fifteen to twenty per week in contrast to one to three per week during periods when negotiations were not in progress.[9] Moreover, these breaks occurred on a daily basis and on all three shifts, with the excessive number of paper breaks generally coinciding with negotiation sessions.

Paper breaks were not the only problem. On the day before the October 3rd bargaining meeting, for example, the fine mesh stainless steel surface of a cylinder on one of the paper forming machines was "sharply cut" along its circumference. James Weil, the Company's plant manager, testified that in thirty-five years experience he had never seen that kind of damage to a cylinder and that usually the type of damage resulting from wear and tear to such cylinders consists of dents or cuts, which are generally across the cylinder, rather than in the direction of its circumference. The repair of this cylinder cost approximately $4,000.

On the same day it was discovered that a 2,300 volt electrical switch had been opened or disconnected causing a complete shutdown of the mill. This switch is located in the defibrator building, separate and apart from the building in which excessive paper breaks were occurring. The uncontradicted testimony is that this incident could not have happened accidentally because the switch is held

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[9] Based on the conflicting testimony presented at the hearing, the Administrative Law Judge found that the more accurate number of paper breaks during non-negotiating periods would be about eight per week:

> I find the frequency rate of paper breaks during the non-negotiating periods was about eight (8) per week, instead of three (3) per week as Respondent [the Company] contends, or considerably more per week as the employee witnesses contend. This figure makes allowance for inaccuracies and bias on the part of witnesses for both parties.

in a closed position, not only by a mechanical catch, but also by a heavy rubber band. Weil saw the switch in the open position with the broken rubber band on the floor. Despite the absence of the rubber band, the mechanical catch would have been sufficient to hold the switch closed, if it too had not been released.

As a result of the above described production disruption and damage, James Weil approached the Union's president, Mack Jordan, and asked him to see whether anything could be done about individuals tampering with equipment and causing production delays. Jordan was angered by Weil's request, did not respond to him, and took no affirmative action. At the negotiation meeting on the following day, October 3, 1973, Rousselle said he was "disturbed" because on the previous day Weil had accused Mack Jordan and other Union members of deliberately disrupting production.[10] Wells responded by saying that the Company would not tolerate a continuation of disruptions in production and that they interfered with "the climate of the negotiations". Wells then made an "official" request of the Committeemen that they see to it that production disruptions cease immediately. None of them made any reply to this request.

Immediately thereafter, a vibration developed in one of the three defibrators requiring it to be shut down. Ball bearings were discovered between its rotating grinding discs.

Sometime about October 11, 1973, the Union held a strike vote among the bargaining unit employees and Rousselle thereafter applied to the International for strike

[10] At the meeting, Rousselle also explained that several months earlier he showed the Company a large piece of metal which was found in the raw materials, and that Mr. Weil had stated at that time that the Company was purchasing the paper chips from any place they could get them and that the Company was not accusing the employees of causing the breakdowns which resulted from the foreign materials.

authorization which it granted on October 23, 1973. Although a strike vote had been taken and a strike authorized, Rousselle admitted he never presented any Company offer to the rank and file for a vote.

At the October 12th negotiation meeting the parties had reached a bargaining impasse.

By October 11th and 12th, paper breaks on both forming machines were so frequent that the machines became inoperable because the pits beneath them were filled with scrap paper. At this point the Company decided to cease operations and lay off 70-80 production employees for a few days. During this time a maintenance crew checked and repaired all the machinery, determining that the recent paper breaks and other problems were not the result of machinery or equipment malfunctioning. Wells testified:

> I found as a result of the shut down . . . there was nothing found during that period of time that would have contributed to the vast number of breaks that we had on the machines.

The Company recalled production employees on October 22nd in the hope that operations would return to normal. However, sabotage of products and equipment reached a crescendo on that date. The record shows that all three defibrators were jammed with junk metal and had to be shut down and that there was a multitude of paper breaks. The Government's rebuttal witness Donald Hall agreed the situation was "unusual." On his 3:00 p.m. to 11:00 p.m. shift there were as many as six breaks an hour on one machine. Paper breaks on the 22nd were so numerous that in the twenty-four hour period on that date, only thirteen and one-half tons of felt were produced, compared to normal daily production of one hundred and ten to one hundred and twenty tons.

Jim Weil, an expert with over thirty years experience in the paper industry, testified that if the scrap metal found in the bins and screw conveyor chamber had worked

its way to the grinding surfaces of the discs, they would have caused an explosion which could have severely damaged the machine and endangered human lives.

Due to the continuing sabotage, it was decided between October 22 and October 31 that plant operations could not continue without serious risk to lives and property. On October 31, 1973, the Company held a meeting first with the Union Committee and then with all the production employees, informing them that it had been decided to discontinue operations with bargaining unit personnel until a contract was agreed upon. A letter to this effect was also sent by registered mail to the home of each employee. The Company's spokesman explained that the decision to lay off the employees had been made primarily to protect the employees' safety and to preserve the Company's assets. Additional reasons given for the lock-out were the Union's unreasonable demands, unresponsive attitude and willful acts, as well as the history of sabotage during prior negotiations between the parties.[11] When the Company representatives finished speaking, Union Representative Rousselle stated, "You let us go before and we will go again. . . . We can hold out to any amount of pressure you can give us. We will not settle for any less than the other plants." A Union Committeeman added, "We don't care if you shut the plant down for six months." [12]

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[11] Testimony at the hearing before the Administrative Law Judge shows that similar incidents of sabotage had occurred in earlier negotiations. During ten weeks of the negotiations resulting in the 1965 contract, there was an average of 9.3 paper breaks per week. In the 1969 negotiations there was a forced shutdown from October 11 through October 27 because fifteen to twenty paper breaks during the week of October 6 had caused the pits to fill up. During the 1971-72 negotiations, paper breaks averaged fifteen to twenty per week from January, 1972 until May or June, 1972 when the contract was settled.

[12] The six month time period refers to the maximum period the employees might be eligible for unemployment compensation benefits, assuming it was determined that the employees were not involved in a labor dispute. From the end of October through the month of April, eighty-eight of the one hundred seven members of the bargaining unit applied for and were awarded such benefits, see *Johns-Manville Products Corp.* v. *Doyal et al.*, 510 F.2d 1196 (5th Cir. 1975). Employees received 54% of their average gross weekly pay. In addition to unemployment benefits the Union also provided the employees with weekly benefits, characterized by Rousselle as "lock-out benefits."

The plant was indeed shut down and the production employees laid off. On November 14, 1973, the Company resumed partial operations using temporary replacements and employees loaned by the Company's other plants.

The parties continued to meet for the purpose of negotiating a new contract. On November 14, 1973, the same day the Company resumed partial production with temporary replacements, the Company presented an improved proposal to the Union. The Union rejected the Company's proposal and offered a counterproposal, which the Company rejected. Subsequent meetings were held on November 27 and November 30, 1973, and on January 23 and March 20, 1974, but the impasse continued.

Reports to the Company concerning the output and profitability of the New Orleans operation during the time when temporary replacements were being used indicated that the Company was losing approximately $300,000 per month in pre-tax profits. Further, due to vastly reduced output, the Company had been forced to curtail operations at two other plants which relied on New Orleans for paper. The record reveals that the Company representatives involved in negotiations or responsible for the New Orleans operation met together after the March 20th negotiations to consider the alternatives. According to the testimony, there were four reasons for their conclusion that the only course left was to hire permanent replacements: (1) with contract negotiations stalemated, it did not seem reasonable to resume operations with

bargaining unit employees without a contract, based on the history of sabotage and disruption preceding the layoff on October 31, 1973; (2) the use of salaried employees and temporary hourly replacements was not producing the required volume and the costs were excessive; (3) the Company was suffering an economic loss of between $280,000 and $300,000 per month, which from November 1, 1973 through March 31, 1974, amounted to a total of about $1.5 million; and (4) the adverse effect the New Orleans labor dispute was having on other plants within the residential products division, including a decrease in the number of employees and days of operations.

After the Company decided it was necessary to hire permanent replacements, it started interviewing applicants. Although seven new people started working the second week of April, 1974, the full one hundred seven employees were not replaced until late June or early July. On June 12, 1974, before the workforce was completely replaced, the parties met and bargained, but without success.

FINDINGS

The role of this Court in reviewing the order of the National Labor Relations Board is to determine whether the Board's decision is supported by substantial evidence on the record as a whole,[13] or is a proper application of the law.[14] This Court has the utmost respect for findings and conclusions of the Board, but recognizes that their judgment is not "the last word." As the Supreme Court

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[13] *NLRB* v. *Brown*, 380 U.S. 278, 291, 85 S.Ct. 980, 983, 13 L.Ed. 2d 839, 849 (1965); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

[14] *Labor Board* v. *Wilcox Co.*, 351 U.S. 105, 112-13, 76 S.Ct. 679, 100 L.Ed. 975 (1956), *NLRB* v. *Insurance Agents Intern'l Union*, 361 U.S. 477, 80 S.Ct. 419, 4 L.Ed.2d 454 (1960).

stated in *N.L.R.B.* v. *Brown*, 380 U.S. 278, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965):

> It is argued, finally, that the Board's decision is within the area of its expert judgment and that, in setting it aside, the Court of Appeals exceeded the authorized scope of judicial review. This proposition rests upon our statement in *Buffalo Linen* [*Labor Board* v. *Truck Drivers Union*, 353 U.S. 87, 77 S.Ct. 643, 1 L.Ed.2d 676 (1957)] that in reconciling the conflicting interests of labor and management the Board's determination is to be subjected to "limited judicial review." 353 U.S., at 96 [77 S.Ct. 643]. When we used the phrase "limited judicial review" we did not mean that the balance struck by the Board is immune from judicial examination and reversal in proper cases. Courts are expressly empowered to enforce, modify or set aside, in whole or in part, the Board's orders, except that the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. National Labor Relations Act, as amended, §§ 10(e), (f), 29 U.S.C. §§ 160 (e), (f) . . . . Courts should be "slow to overturn an administrative decision," *Labor Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 [76 S.Ct. 679, 100 L.Ed. 975], but they are not left "to 'sheer acceptance' of the Board's conclusions," *Republic Aviation Corp.* v. *Labor Board*, 324 U.S. 793, 803 [65 S.Ct. 982, 89 L.Ed. 1372]. Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions.

> Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co.* v. *Labor Board*, [380 U.S. 300, 318, 85 S.Ct. 955, 957, 13 L.Ed.2d 855 (1965)] [footnote citation omitted]. 380 U.S. 278, 290-92, 85 S.Ct. 980, 987, 13 L.Ed.2d 839.

In the instant case the Board, in accordance with the finding of the Administrative Law Judge, held that "the evidence in this record is insufficient to support a conclusion and finding that [the Company's] employees engaged in an in-plant strike or in concerted improper conduct so as to enable it to replace or discharge its entire complement of production employees." We agree with the factual findings of the Administrative Law Judge and the Board, but not with the conclusions they reached.

Based on the facts as discussed above, this Court finds that, as a matter of law, the employees were involved in what amounted to an in-plant strike. The employees' conduct was so severe that we cannot help but find that their behavior was tantamount to a strike and forced the Company to lock them out. The Company's reaction had a valid, substantial business justification and there was no anti-union motivation indicated by the record or found by the Board or asserted by the Union. The history of the relationship between the parties reveals the Company's continuing desire to negotiate and full recognition and acceptance of the Union, notwithstanding numerous incidents of prior sabotage by the employees. In the most recent negotiation period, Company management on at least two occasions requested Union officials to see if something could be done about individuals causing damage and disruptions; the Union never responded, or expressly denied the allegations. In the interest of public policy and industrial peace, we cannot condone behavior which causes actual and substantial damage to property or potential, serious injury to human lives. Although employees and employers are permitted to choose their own weapons in the bargaining battle,[15] the employees in the instant case went too far. Since we find their actions amounted to a strike, the Company's subsequent lock-out and hiring of permanent replacements were not violative of the National Labor Relations Act, including Sections 8(a)(1), (3) and (5). *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938).[16] This

[15] Quoting from *NLRB* v. *Insurance Agents*, 361 U.S. 477, 80 S.Ct. 419, 4 L.Ed.2d 454 (1960), the Supreme Court has stated:

> Our decisions hold that Congress meant that these activities [attempting to exert economic strength], whether of employer or employees, were not to be regulable by States any more than by the NLRB, for neither States nor the Board are "afforded flexibility in picking and choosing which economic devices of labor and management would be branded as unlawful." . . . Rather, both are without authority to attempt to "introduce some standard of properly 'balanced' bargaining power," . . . or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining." *Lodge 76, Etc.* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 96 S.Ct. 2548, 2557, 49 L.Ed.2d 396 (1976).

See also, *Inter-Collegiate Press* v. *NLRB*, 486 F.2d 837, 847 (8th Cir. 1973) ("Neither the Board nor the courts should sit as arbiters of the permissible economic weapons available to the parties in a labor dispute"); *NLRB* v. *Dalton Brick & Tile Corp.*, 301 F.2d 886, 895 (5th Cir. 1962).

[16] In *Mackay Radio*, the Supreme Court held that it was not an unfair labor practice for the employer to replace his striking em-

conclusion precludes the necessity of considering the other issues raised by the parties,[17] particularly the ques-

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ployees with other employees in an effort to carry on his usual business and neither was the employer bound to later discharge the more-recently-hired employees in order to reinstate the strikers. However, the employer was found to have committed an unfair labor practice in violation of § 8 of the National Labor Relations Act when he discriminated against certain of the strikers by refusing to rehire them for the sole reason that they had been active in the union.

[17] The Administrative Law Judge and the Board in the instant case determined that the employees were not engaged in an in-plant strike or concerted action sufficient to justify the Company's permanently replacing them without notice after a lawful lockout and bargaining impasse; that such action tilted the scales out of balance with respect to bargaining power; and that such action also rendered more than a slight adverse effect upon the employees' protected rights, as compared with the Company's legitimate business purpose and its lockout bargaining leverage. The Administrative Law Judge further found, and the Board agreed, that the Company's action was so inherently discriminatory and destructive of the employees' rights that such action constituted a per se violation of Section 8(a)(1) and (3) of the Act. It was further held that the hiring of permanent replacements in effect constituted a withdrawal of recognition of the employees' elected bargaining representative and was indicative of bad faith bargaining or refusing to bargain on the part of the Company, all in violation of Section 8(a)(5) of the Act.

In passing we would like to note that when certain conduct by an employer is found to be "inherently destructive" of employees' rights, the conduct is deemed to be a per se violation and it is unnecessary to examine the employer's intent behind that conduct in order for the employer to be guilty of having violated the Act. When the employer's conduct is not inherently destructive but rather has only a comparatively slight impact or slight adverse effect on employees' rights, then intent becomes an important issue. If there is subjective evidence of anti-union motivation, then the employer has committed a violation. In the absence of anti-union motivation, a balancing test is done to determine whether the employer's legitimate business reasons outweigh the effect on the employees' protected statutory rights. *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 380, 88 S.Ct. 543, 19 L.Ed.2d 614 (1967); *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967); *NLRB* v. *Brown*, 380 U.S. 278, 287, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965). Because the Board and the Administra-

tion of whether an employer may permanently replace locked out employees after bargaining impasse.[18]

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tive Law Judge held the conduct of the employer in the present case to be a per se violation, there was no need to go any further. But as long as they attempted to perform the balancing test, we observe the instruction of judicial precedent that neither the Board nor the courts are permitted to choose the weapons or balance the bargaining power of the parties beyond that delineated by Congress in the National Labor Relations Act and other federal and state labor law. See n. 15 *infra*. As noted in the text, however, due to our disposition of the case before us, we need not reach these issues.

[18] In *American Ship Bldg.* v. *Labor Board*, 383 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965), the Supreme Court held that an employer does not commit an unfair labor practice under the Act when, after an impasse in negotiations has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of applying economic pressure in support of his bargaining position. However, in a footnote, the Court expressly reserved ruling as to the consequences that would follow if an employer replaced his employees with permanent replacements or temporary help. *Id.* at n. 8.

This Court in *National Labor Relations Board* v. *Dalton Brick and Tile Corp.*, 301 F.2d 456 (5th Cir. 1962), upheld the use of a lockout for legitimate bargaining purposes when not accompanied by any anti-union animus.

The Eighth Circuit went one step further by holding that an employer's conduct in hiring temporary replacements during a lawful lockout was not "inherently destructive" of employees' rights and, balanced on the facts presented in that case, was not a violation of the Act. *Inter-Collegiate Press* v. *NLRB*, 486 F.2d 837 (8th Cir. 1973), cert. denied, *Bookbinders Local No. 60* v. *NLRB*, 416 U.S. 938, 94 S.Ct. 1939, 40 L.Ed.2d 288. This approach was adopted by the Administrative Law Judge in the instant case in reference to the hiring of temporary employees after the lockout, with no party challenging it.

One year ago in *Lodge 76, Intern'l Assoc. of Machinists and Aerospace Workers, AFL-CIO* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976), the Supreme Court considered federal preemption of state regulation of a group of employees' concerted refusal to work overtime while a new contract was being negotiated. After holding that the state was preempted from regulating such conduct (although such conduct was not expressly protected or prohibited by the Act), the Supreme Court stated:

Johns-Manville's petition to set aside the order of the National Labor Relations Board is hereby granted and the Board's cross-petition for enforcement of said order is hereby denied.

WISDOM, Circuit Judge, dissenting:

I must respectfully dissent.

The Court today infers that an in-plant strike occurred at the Johns-Manville paper plant in New Orleans despite contrary factual conclusions by the administrative law judge and the National Labor Relations Board.[1] As I

Moreover, even were the activity presented in the instant case "protected" activity within the meaning of § 7, economic weapons were available to counter the union's refusal to work overtime, *e.g.*, a lockout, *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855, and the hiring of permanent replacements under *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938). [footnote omitted]. 96 S.Ct. at 2559.

Although we adhere carefully to the words of the Supreme Court we would not say at this time that the above statement clearly indicates whether the hiring of permanent replacements in the absence of a strike (as in *Mackay, supra*, n. 16) would be a violation of the Act.

[1] The administrative law judge found:

> Consequently, based upon the foregoing credible evidence, legal authority, and reasons, while I conclude and find such evidence sufficient to legally justify the respondent's lockout of its employees to impose economic pressure upon them in an effort to advance its bargaining position, on the one hand, and to protect its legitimate and substantial business operations from frequent disruptive operations on the other, I nevertheless do not find such evidence sufficient to support a conclusion and finding that respondent's employees were engaged in an in-plant "strike," so as to enable it to replace or discharge its entire complement of production employees.
>
> In view of the fact that such disruptive acts could have been performed by any one employee, acting independently and not on behalf of any other employee or the Union; that the evidence

read the record, substantial evidence *does* support the Board's conclusion that the company violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. Here, the company could not identify a single worker who participated in the alleged strike and could not even determine with reasonable definiteness when the strike occurred. With deference, I submit that the Court's holding is both factually and legally erroneous.

Because of its finding that there was an in-plant strike, the majority did not reach the difficult question whether a company may permanently replace locked-out workers. I would reach this question and hold that the replacement of these workers without notification violated sections 8(a)(1) and 8(a)(3) of the Act.

> of record fails to show that respondent conducted any in-plant investigation in an effort to ascertain who was responsible for such disruptive activities; that the respondent did not introduce any evidence which identified any employee who was even alleged to be responsible for such activities, I am thereby persuaded that the respondent did not have reasonable and sufficient objective considerations upon which to conclude that any or all of its employees were engaged in improper and unlawful conduct or concerted activity, so as to justify its replacement or discharge of all of its production employees, innocent or guilty alike.

The Board adopted the findings, conclusions, and recommended order of the administrative law judge. One member of the Board, dissenting, stated:

> I join my colleagues in finding that respondent violated Section 8(a)(3), (5), and (1) of the Act by permanently replacing its entire complement of locked-out unit employees. However, contrary to my colleagues, I would find in accord with my dissenting opinions in *Ottawa Silica Company*, 197 NLRB 449 (1972), and *Inter Collegiate Press, Graphic Arts Division-Sargent Welch Scientific Co.*, 199 NLRB 177 (1972), that Respondent violated Section 8(a)(1) and (3) by operating its plant with temporary replacements for its locked-out employees from November 1973 until April 1974, when it discriminatorily replaced the locked-out employees with permanent employees.

I.

The majority opinion relies[2] on the factual inference that all or a majority or a substantial minority of the workers at the plant sabotaged production from August through October 1973. The inference is drawn from several occurrences and, according to the majority, flows from the facts as found by the administrative law judge. First, the Court concludes that an unusual number of paper breaks or tears occurred as the paper was processed in August, September, and October. Because the increase in breaks was supposedly so great and coincided with negotiations for a new contract, the Court concluded that the workers caused the disruptions. Second, the Court concluded that metal periodically found lodged in production equipment was inserted by the workers. Third, the majority says that the workers disconnected a power switch and cut a cylinder on a paper dryer.

The union emphatically denied that its unit employees engaged in disruptive activities in the plant. The facts that the administrative law judge found relating to these occurrences do not support the inference that all or a

[2] The conclusory nature of the majority opinion creates an ambiguity in the Court's holding. The majority declares that an "in-plant strike" occurred because someone or a number of employees must have committed acts causing the production disruptions. The opinion does not reveal, however, whether this "strike" is concerted protected activity or unprotected activity under section 7 of the Act, 29 U.S.C. § 157 (1970). The opinion does not indicate whether the inferred strike is the equivalent of a strike voted by the majority of the members of the union or whether it is the equivalent of concerted activity by a minority. If the assumed action by the workers amounts to concerted minority action, the opinion does not explain whether the action supports a clearly articulated union position or whether the union has organized or supported the activity. *See NLRB* v. *Shop Rite Foods, Inc.*, 5 Cir. 1970, 430 F.2d 786. The legality of the assumed worker conduct, as well as the legality of the employer's response, depends in part on these unanswered questions.

majority or even a substantial number of employees participated in any plant sabotage. Instead, the record provides substantial evidence in support of the Board's decision that no worker had been sufficiently linked to unprotected conduct to justify his dismissal or replacement.

The Paper Breaks. The company and the majority of the Court base their argument that an in-plant strike occurred primarily on the assertion that the workers disrupted production by causing paper breaks. Although the majority says that it accepts the factual findings of the Board, its adoption of the company's version of the facts belies the asserted deference and ignores substantial evidence supporting the Board's findings. For example, the parties disputed the average number of paper breaks occurring during non-negotiating periods. The company contended that about three breaks occurred each week. Workers, including utility men who would rethread machines after breaks, testified that as many as twenty breaks occurred each week. After considering all of the testimony, the administrative law judge found that the paper probably broke about eight times in an average week. Yet the majority bases its decisions on the company's estimate of three a week without demonstrating why the facts do not support the administrative law judge's finding.[3]

[3] In cases where company records provide a clear picture of industrial activity, perhaps reliance on company information and disregard of testimony by workers would be justified. But here, the majority is not relying on records accumulated in the regular course of business. Instead, data supporting the majority's contentions come from the personal diary of the plant production manager, hardly an unbiased observer in the dispute. The company fortuitously destroyed its records about the paper breaks even though the impasse continued at the time of destruction. The administrative law judge found:

> Paper breaks are caused by several unintentional factors as well as by intentional acts; that the frequency of such paper breaks, though somewhat stabilized during nonnegotiating

If the administrative law judge's facts are used, the company experienced less than one additional paper break per shift during August through October 1973. This is not a significant increase and disproves the contention that a substantial number of workers participated in concerted activity. Indeed, as the administrative law judge concluded, the more reasonable inference is that the workers were not responsible for the breaks or that one or two dissidents caused the disruptions.

The inference that a substantial number of the workers did not create the disruptions is bolstered by the history of mechanical problems that periodically caused increases in breaks. The record contains evidence of unusually frequent breaks in January, May, and July of 1973, long before any negotiations. An employee testified that excessive breaks in January caused the company to change its policy about shutting down machines to remove paper after a break. Before January 1973, management relied on regular cleaning crews to pick-up the waste. But the increase in breaks in early 1973 prompted the company to grant supervisors the discretion to order paper removed from scrap pits.

The Board's findings are also supported by the failure of the company to attempt to identify any individual as

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periods, was nevertheless erratically unstable on some occasions during the same period; that anyone, or a combination of employees, can intentionally or unintentionally cause paper breaks by improperly adjusting the heat or revolutions of the dryer machines, by varying the paper mixture formula, or by striking the paper with the hand or an object; and that since Manager Weil's testimony on the frequency of paper breaks was not from official company records, and additionally, was in conflict with the testimony of some of the employees who operate the machines daily, I find the frequency rate of paper breaks during the nonnegotiating periods was about eight (8) per week, instead of three (3) per week as respondent contends, or considerably more per week as the employee witnesses contend. This figure makes allowance for inaccuracies and bias on the part of witnesses for both parties.

a saboteur. The majority justifies this failure to identify even one worker who disrupted production by asserting that detection was impossible. Here again, the majority has accepted the company's story without critical analysis. Most importantly, the failure by the company even to attempt to find a worker in an act of sabotage or to identify a saboteur in some way prevents the conclusion that detection was "difficult if not impossible". It seems to me that if the disruptions were as serious as the company alleged, the facts suggest that detection was probable and that the company should have resorted to serious attempts at surveillance. With 107 production employees, management had to supervise only 35 workers on each shift. Supervisors were in the plant; guards could have been added.[4] Although the majority contends that the expanse of the plant prevented adequate supervision, the facts do not show that the disruptions occurred in all of the buildings. Instead, they occurred in only three.[5] If the breaks were as numerous as the majority contends, a tally of them might have revealed a pattern permitting

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[4] The employer in *NLRB* v. *Shop Rite Foods, Inc.*, 5 Cir. 1970, 430 F.2d 786, 787, hired guards to catch suspected saboteurs. When a supervisor eventually caught an employee cutting sacks of flour, the worker was fired for engaging in conduct not protected by the Act.

[5] The majority also accepted the company's contention that paper breaks were easy to make and therefore undetectable. The administrative law judge recognized the ease with which breaks occurred. The delicate nature of the production process also supports the administrative law judge's conclusion that mechanical problems could have caused the breaks as easily as disgruntled workers. That the company checked the machinery in October and found no obvious mechanical problems does not upset this inference. Because the records about the breaks have been destroyed, we cannot assess the accuracy of the mechanical check. In addition, paper breaks increased during other non-negotiating periods, and no mechanical causes appeared. If the breaks were as easy to cause and impossible to detect as the company contends, workers engaged in concerted plant sabotage probably would have created more disruptions than actually occurred.

further narrowing of the scope of supervision. Because the company destroyed all records about these disruptions (company policy requires records to be kept for one year), it could not now determine whether the breaks usually occurred in the vicinity of particular workers. Nevertheless, the facts provide little support for the contention that detection was impossible at the time when the information was available. The reasonable inference is that the company failed to identify any saboteurs because the small increase in breaks did not warrant an investigation.[6]

Finally, the majority relies on production figures to show that the disruptions were widespread during the negotiations. Yet the only figure cited is 13½ tons, the production for October 22, when all parties agree that an unusual number of breaks occurred.[7] The record shows, however, that October 22 was the only day when the company experienced a substantial loss of production. The average output of the plant was 110 tons a day during non-negotiating periods. In August, September and October 1973, the critical period, production ranged from 104 tons a day to 112 tons a day. Despite these figures, the majority concludes that an in-plant strike occurred at some unspecified time during the period. We are therefore asked to believe that a substantial number of unidentified employees engaged in concerted industrial sabo-

[6] Even though the majority excuses the company's failure to investigate, the opinion relies in part on the failure of the union to react to the disruptions. The union, however, had less access to the plant and company records than management. I would not condemn the union for not uncovering the saboteurs, when the company failed even to investigate the sources of the alleged sabotage.

[7] On October 22 workers returned to work after the company had locked them out to check machinery. The labor dispute had reached its peak by then; the parties had reached an impasse. If the company seriously expected widespread worker sabotage, it should have expected disruptions on the twenty-second. Yet management still made no attempt to identify the saboteurs.

tage that was easy to accomplish and impossible to detect, and yet that the employees met or exceeded the average output of the plant. It is not surprising that the majority and the company have such a difficult time attempting to establish the date of this strike or the identity of the strikers. As the Board concluded, the facts do not demonstrate that a strike occurred.

The Metal. The majority submits that the workers sabotaged the plant by inserting scrap metal into the machinery. Specifically, the opinion states that the workers inserted ball bearings into a grinder shortly after the October 3 bargaining session. How the majority determined that workers had placed the metal in the production process is unclear. No direct evidence supports that conclusion. Even the company, at the October 3 bargaining session, acknowledged the more reasonable inference that small pieces of metal such as ball bearings were probably mixed with the wood chips ground to make paper slurry. After union officers pointed out instances of metal damage in August, including the jamming of a defibrator with ball bearings, company officials admitted that the company was not accusing its employees of placing metal in the wood. As of October 3, then, the facts do not support the inference that any worker engaged in an in-plant strike by jamming machinery with metal. During the period after October 3, the evidence connects no individual worker to the metal jams, and the majority fails to specify when the introduction of foreign materials into the production process amounted to a strike. Because the number of jams and the amount of metal was so small, the Board's conclusion that one or two disgruntled employees caused the jams finds substantial support in the record.

The Power Switch and Damaged Cylinder. The record contains no direct evidence as to the cause of either the disconnecting of a major power switch or the cutting of

a wire mesh cylinder on October 2. The majority uses the incidents to supports its theory of an in-plant strike. Both occurrences support the Board's conclusion that only one or two workers acting independently created several of the disruptions. It takes only one person to throw a switch or to cut a cylinder. If a group had been involved in either incident, the participants probably would have been detected. The majority has therefore failed again to demonstrate that a substantial number of employees sabotaged the plant or otherwise engaged in an in-plant strike.

On these facts the Court concludes that "the employees in the instant case went too far"; they struck and may be replaced. Whenever the employees "went", as a matter of fact the entire workforce did not strike, and there is no evidence that a substantial number of employees struck. The facts prove no more than that one or two or a handful of workers may have created a few production disruptions, most of them occurring on October 22, 1973. The facts do not show *who* "went too far" or *when* they went there. Consequently, the facts do not show a strike by anyone. Instead, the record shows that substantial evidence supports the conclusion of the administrative law judge and the National Labor Relations Board that the company identified no workers as actually connected to any misconduct justifying replacement or dismissal.[8]

II.

The majority declares that a strike occurred as a matter of law at the Johns-Manville plant. This holding is unprecedented. The Court cites no section of the Act, no

[8] As set out in section II of this opinion, the case law does not support the holding that in-plant concerted activity damaging company property is protected under section 7. Consequently, the majority opinion would appear to justify other disciplinary action by the company, including the firing of all of the workers.

decision of a court, no holding of the Board, and no argument of labor policy in support of its conclusion. There is no citation because no supporting case exists. Both law and policy compel the conclusion reached by the Board that action may not be taken against in-plant strikers until the participating workers are identified.

The first legal error made by the majority, if I may say so with deference, is its confusion of unprotected employee activity, with protected activity. The Court says that an "in-plant strike" occurred as a matter of law. Participation by workers in an in-plant strike has consistently been regarded as unprotected concerted activity.[9] In this case the sabotage asserted by the company would, if proved, be deemed unprotected because it allegedly interfered with the company's rightful use of its property, damaged the property, and endangered lives.[10] When the majority addresses the validity of the permanent replacement of the workers, however, it grants its approval with citation only to *NLRB* v. *Mackay Radio & Telegraph Co.*, 1938, 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381, a case involving an ordinary strike protected by section 7 of the Act. The Court's reasoning therefore yields the following conclusion: concerted activity outside the protection of the

[9] *E.g., NLRB* v. *Fansteel Metallurgical Corp.*, 1939, 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627 (takeover and damage of employer's property by workers); *NLRB* v. *Clinchfield Coal Corp.*, 4 Cir. 1944, 145 F.2d 66 (interference with employer's operation of its mining facilities); *Honolulu Rapid Transit*, 1954, 110 NLRB 1806 (intermittent on-the-job strikes); *Elk Lumber Co.*, 1950, 91 NLRB 333 (slowdown); *cf. NLRB* v. *Shop Rite Foods, Inc.*, 5 Cir. 1970, 430 F.2d 786 (action by a minority of workers in a unionized plant); *NLRB* v. *Draper Corp.*, 4 Cir. 1944, 145 F.2d 199 (action by a minority of workers in a unionized plant).

[10] Recently, the Supreme Court suggested that partial strikes may not always be deemed unprotected under section 7. *Lodge 76, Int'l Ass'n of Mach. & Aero. Wkrs.* v. *Wisconsin Employment Relations Comm'n*, 1976, 427 U.S. 132, 152 n. 14, 96 S.Ct. 2548, 49 L.Ed.2d 396. But the Court also approved cases such as *Fansteel* in which activity interfering with the company's use of its property or damaging the property was denied protection.

Act by unidentified workers permits the inference that the entire workforce engaged in protected concerted activity. I cannot buy this. The lack of logic or policy in this inference explains why the proposition is unique in America labor law.

As its second legal error, the Court approves company action against all of its production employees even though no individual has been specifically connected with any concerted activity, protected or unprotected. *Mackay* approved the permanent replacement only of workers who were identified as striking. 304 U.S. at 337, 345, 58 S.Ct. 904. Similarly, companies have been permitted to respond unilaterally to unprotected activity only when the participating workers have been identified. In *Stewart Die Casting Corp.* v. *NLRB*, 7 Cir. 1940, 114 F.2d 849, *cert. denied*, 1941, 312 U.S 680, 61 S.Ct. 449, 85 L.Ed. 1119, for example, a sit-down strike by unidentified employees preceded a general strike by the entire workforce. The company argued that the employment relationship with all the workers had terminated, not just the relationship with those who had participated in the sit-down strike. The Court of Appeals rejected the contention:

> In this connection, it is also pertinent to observe that the record, with the exception of twelve or fourteen Board witnesses who admitted they participated in the sit-down strike, is silent as to who were the participants. In fact, it is shown with no certainty as to the number who participated. Petitioner's president estimated the number at 75, the Board found "about 100" and some of the witnesses placed the number as high as 150. . . . Certainly all of the employees should not be deprived of the benefits of the Act because certain undisclosed ones forfeited their rights.

Id. at 856.

The reasoning of *Stewart Die Casting* is consistent with all other reported cases involving unprotected concerted activity by a minority of employees,[11] unprotected sit-down strikes,[12] unprotected slow-down actions,[13] and unprotected displays of violence by workers.[14] In no case has

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[11] *E.g. Emporium Capwell Co.* v. *Western Addition Community Org.*, 1975, 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed.2d 12 (Strikers were identified as they picketed the plant); *NLRB* v. *Shop Rite Foods, Inc.*, 5 Cir. 1970, 430 F.2d 786 (Strikers were identified when they failed to time-in for work); *NLRB* v. *Sunbeam Lighting Co.*, 7 Cir. 1963, 318 F.2d 661 (Only the 50 workers who walked out in a wildcat strike were discharged.); *C. G. Conn, Ltd.* v. *NLRB*, 7 Cir. 1939, 108 F.2d 390 (Workers were identified as they walked out.); *Terry Poultry Co.*, 1954, 109 NLRB 1097 (Only two workers who left the assembly line to present a grievance to management were discharged.).

[12] *E.g., NLRB* v. *Fansteel Metallurgical Corp.*, 1939, 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627 (The company fired only the workers who participated in the violent sit-down strike.); *NLRB* v. *Clinchfield Coal Corp.*, 4 Cir. 1944, 145 F.2d 66 (The company fired only the workers who had blocked the entrance to the mine with a coal car.); *Stewart Die Casting Corp.* v. *NLRB*, 7 Cir. 1940, 114 F.2d 849 (The company could not discipline the entire workforce for a sit-down strike launched by an undetermined number of the workers).

[13] *E.g., Harnischfeger Corp.* v. *NLRB*, 7 Cir. 1953, 207 F.2d 575, (The company discharged only the three men who led a partial, intermittent work stoppage.); *Honolulu Rapid Transit Co.*, 1954, 110 NLRB 1806 (The company discharged only those drivers who did not report for work during intermittent work stoppages.); *Elk Lumber Co.*, 1950, 91 NLRB 333 (The company fired only those workers who slowed the pace of their work and discussed the slowdown with management.).

[14] *E.g., Seminole Asphalt Refining, Inc.* v. *NLRB*, 5 Cir. 1974, 497 F.2d 247 (The Court refused to enforce a Board order of reinstatement only after concluding that the three workers had actually participated in violence); *W. J. Ruscoe* v. *NLRB*, 6 Cir. 1969, 406 F.2d 725 (The identification of workers who participated in violence included photographs of the activity). *Oneita Knitting Mills, Inc.* v. *NLRB*, 4 Cir. 1967, 375 F.2d 385 (The company could not alter the seniority of returning strikers but could fire a worker who drove a car from which eggs were thrown. The Court required reinstatement of a worker who was not sufficiently connected by the facts to the egg throwing.); *NLRB* v. *Clearfield Cheese Co.*, 3 Cir. 1954,

a company been permitted to discipline, replace, or fire workers who did not participate in the activity. The picket line violence cases are particularly instructive because the courts have required clear identification of the offending workers before action may be taken against them. In *NLRB* v. *Mt. Clemens Pottery Co.*, 6 Cir. 1945, 147 F.2d 262, for example, the company argued that it had no duty to reinstate any unfair labor practice striker because violence had erupted during the strike. The Court of Appeals concluded that only two workers had committed acts that would justify denying them reinstatement. As for the other workers, "the violence of these two employees, so clearly established by their convictions, is not, however, to be imputed to other union members in the absence of proof that identifies others as participating in such violence." *Id.* at 267. Yet the violence and sabotage that the Johns-Manville management says occurred at its plant are imputed to the entire workforce with no evidence identifying any participant. The Court's holding disregards thirty years of contrary precedent supporting the Board's decision.

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213 F.2d 70 (Reinstatement after an unfair labor practice strike was denied only to 21 employees who were clearly identified as participants in picket line misconduct); *NLRB* v. *Mt. Clemens Pottery Co.*, 6 Cir. 1945, 147 F.2d 262 (The Court refused to impute the violence of two employees to the rest of the workforce.); *Republic Steel Corp.* v. *NLRB*, 3 Cir. 1939, 107 F.2d 472, modified on other grounds, 1940, 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6 (Workers denied reinstatement were identified by criminal convictions.); *Alcon Cable West*, 1974, 214 NLRB 236 (One worker may be terminated because the facts sufficiently connected him to violence; another worker, who participated only in the isolated incident could not be terminated.); *Jai Lai Cafe*, 1973, 200 NLRB 1167 (The two employees terminated had engaged in mass picketing, had placed nails in the road to puncture tires, and verbally had abused customers and other workers.); *Berkshire Knitting Mills*, 1943, 46 NLRB 955 (When the company could not prove that several employees had engaged in misconduct, the Board prevented their discharge.).

The implication of the in-plant strike also violates the labor policy embodied in section 7 of the Act[15] in that it inhibits future unionization and collective bargaining. Workers have the right to bargain collectively, to unionize, and to refuse unionization without coercion. The origin of these rights is the policy judgment by Congress that the settlement of labor disputes by collective bargaining will diminish industrial strife. The proper role of the Board and the courts, therefore, is to protect the process of collective bargaining and the freedom of workers to decide whether to unionize. *American Ship Building Co.* v. *NLRB*, 1965, 380 U.S. 300, 308-09, 85 S.Ct. 955, 13 L.Ed.2d 855; *Inter-Collegiate Press* v. *NLRB*, 8 Cir. 1973, 486 F.2d 837, *cert. denied sub nom. Bookbinders Local No. 60* v. *NLRB*, 1974, 416 U.S. 938, 94 S.Ct. 1939, 40 L.Ed.2d 288; Note, 85 Harv.L.Rev. 680 (1972).

No one can question the majority's statement that the protection of these basic policies must be distinguished from attempts to balance the economic strengths of parties in collective bargaining. Economic coercion may be used to achieve particular terms and conditions of employment. *International Association of Machinists and Aerospace Workers* v. *Wisconsin Employment Relations Commission*, 1976, 427 U.S. 132, 143-44, 96 S.Ct. 2548, 49 L.Ed.2d 396. But the coercion may not be directed toward inhibiting the exercise of section 7 rights.

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[15] 29 U.S.C. § 157 (1970) states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

In this case the Court has given employers a lethal new tool to combat future unionization and to avoid the process of collective bargaining. By permitting the employer to imply the existence of a strike without identifying any participant and on, what appears to me, to be a flimsy factual basis, the Court in effect denies workers their livelihoods because they joined a union and engaged in collective bargaining. The message will not be lost on workers or management. When a worker joins a union and attempts to bargain about the terms of his employment, he may now lose his job if at his plant any disruptions of production occur which may be laid at the door of a few malcontents or overreacting union workers. Even though he produces a normal output and puts no economic pressure on the company, management may replace him with impunity; the Court of Appeals will infer that he created the disruptions, because the disruptions coincided with his union's negotiations for a new contract. Conversely, when a company tires of its unionized workforce, it can highlight a few production disruptions during contract negotiations, infer an in-plant strike, and replace its workers with non-unionized employees. As a result, workers will be encouraged to avoid unionization and the process of collective bargaining. Companies will be encouraged to thwart bargaining and unionization by visiting the sins of the few on the many, causing unemployment on those who seek to exercise their section 7 rights.

By declining to infer the existence of an in-plant strike, the Board refused to countenance damage to these basic policies. The majority justifies its reversal of the Board in part because the Supreme Court has instructed courts not to rubber stamp "administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute", *quoting NLRB* v. *Brown*, 1965, 380 U.S. 278, 291, 85 S.Ct.

980, 988, 13 L.Ed.2d 839. In the case before us, however, the majority rather than the Board frustrates congressional policy and in the process ignores overwhelming precedent in support of the Board's decision. I would affirm the holding that no in-plant strike occurred, as a matter of law and fact, and that no worker was sufficiently linked to unprotected conduct to justify his dismissal or replacement.[16]

III.

Because I would sustain the Board's decision on whether a strike occurred, I must address the more difficult legal question raised by the parties: may an employer who has locked out his nonstriking workers permanently replace them without notification? The Supreme Court declined to reach the question in *American Ship Building Co.* v. *NLRB*, 1965, 380 U.S. 300, 308, n. 8, 85 S.Ct. 955, 13 L.Ed.2d 855. This Court has never faced the issue.

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[16] The company also submits that the workers began a regular strike at the same time as the lockout. The members of the unit approved a strike and received authorization for it from the International. But this is a common negotiating technique and does not justify the inference that a strike actually occurred. The company also relies on a statement made by the International representative to company officials:

> [Y]ou let us go before and we will go again . . . We can hold out to any amount of pressure you can give us . . . . [W]e will not settle for any less than the other plants.

Because this statement refers to the lockout that had just ended and responds to the company's announcement on October 31 of another lockout, the sentences logically refer to the union's ability to withstand a lockout, not to the imminence of a strike. "Holding out" to company pressure in this context means refusing to capitulate to the company's contract demands despite the economic pressure. Finally, the receipt of union benefits would show a strike only if strikers alone could receive the benefits. The company offered no evidence to prove that locked-out workers could not receive such benefits. In short, the record does not support the assertion that the employees mounted an economic strike.

A.

The administrative law judge concluded that permanent replacement of locked-out workers amounted to a violation of sections 8(a)(1),[17] 8(a)(3),[18] and 8(a)(5)[19] of the Act. With regard to the 8(a)(1) and 8(a)(3) violations, the administrative law judge held both that the employer's business purpose could not outweigh the damage inflicted by the replacement on worker rights and that *NLRB* v. *Erie Resistor Corp.*, 1963, 373 U.S. 221, 83 S.Ct. 1139, 10 L.Ed.2d 308, required finding the replacement to be a per se violation of the sections. The Board agreed with the administrative law judge that the hiring of permanent replacements without notifying the union "rendered more than a slight adverse effect upon employees' protected rights, as compared with Respondent's legitimate business purpose". Neither the Board's nor the administrative law judge's opinion reveals the basis of the comparison of the employer and employee interests.

The company attacks the order on two levels. First, it argues that permanent replacement of locked-out

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[17] 29 U.S.C. § 158(a) states in part:

> It shall be an unfair labor practice for an employer—
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . .

[18] 29 U.S.C. § 158(a) states in part:

> It shall be an unfair labor practice for an employer—
> . . . .
> (3) by discrimination in regard to hire or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor organization . . . .

[19] 29 U.S.C. § 158(a) states in part:

> It shall be an unfair labor practice for an employer—
> . . . .
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

workers should not constitute a per se violation of the Act. It bases this argument on *NLRB* v. *Mackay Radio & Telephone Co.*, 1938, 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381, which held that an employer may continue to operate his business during a strike with permanent replacements. The employer also contends that the replacement of these workers did not inherently destroy their rights because they retained certain privileges guaranteed by the Supreme Court.[20] Second, the company justifies the replacement of these workers by balancing its business interests against the rights and interests of the employees. On the company's side of the scales, Johns-Manville places the interest in the survival of the plant as a profitable component of the enterprise. Because of the lockout, the company lost money and faced a loss of permanent customers. The temporary replacements

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[20] The replaced worker is subject to recall in the event of a vacancy, *Laidlaw Corp.*, 1968, 171 N.L.R.B. 1366, *enforced*, 7 Cir. 1969, 414 F.2d 99, *cert. denied*, 1970, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 100. He may vote in any representation election conducted within twelve months after commencement of a strike. *Wahl Clipper Corp.*, 1972, 195 N.L.R.B. 634. The union may continue to bargain unless the company has sufficient evidence to challenge its representative status. *C. H. Guenther & Son, Inc.* v. *NLRB*, 5 Cir. 1970, 427 F.2d 983, *cert. denied*, 400 U.S. 942, 91 S.Ct. 240, 27 L.Ed.2d 246.

Although these cases provide the replaced worker some protection, they do not lead to the conclusion that his rights and interests have not been damaged. The protections listed above are of only minimal value to the locked-out Johns-Manville workers. First, in the sluggish economy of 1974 few vacancies occurred. Second, because the company permanently replaced the workers five and a half months after the lockout, the workers' right to vote in representation elections probably extended only six and a half months after the replacement. The company needed only to wait a short time to gain a representation election in which the electorate would have been composed exclusively of replacements. Third, the union's ability to represent the bargaining unit was substantially undermined by the replacement of the entire workforce. In comparison to the rights that a fully employed worker enjoys, then, the rights granted to a locked-out and permanently replaced worker are inferior.

employed immediately after the lockout began had not performed satisfactorily. The management felt that it could not have reactivated the locked-out workers without a contract because of the production disruptions that had occurred five and a half months previously. It also desired to maintain its bargaining position. To avoid further losses without capitulating to the union, then, it argues that its only alternative was to employ the permanent replacements. On the workers' side of the scale, the company places the right to continue the bargaining unit and the right to bargain through that unit. After asserting that it did not intentionally damage these two rights, the company says that detriment by permanent replacement after the lockout was no greater than damage by replacement after the strike in *Mackay*.

B.

I respond to these arguments by analyzing the interests of the parties and the motive of the company consistent with the facts found by the administrative law judge.

I would adhere to the guidelines established by *NLRB* v. *Great Dane Trailers, Inc.*, 1967, 388 U.S. 26, 87 S.Ct. 1792, 18 L.Ed.2d 1027, for assessing alleged (8)(1) and 8(a)(3) violations.[21] *Great Dane* analyzed an alleged infraction of section 8(a)(3) by a company's refusing to pay accrued vacation benefits to strikers while paying the benefits to replacements, nonstrikers, and returning strikers. The Court identified three elements of an 8(a)(3) unfair labor practice: discrimination against workers exercising their rights, resulting discouragement of union membership, and anti-union motivation on the part of the company. Although the Court easily found discrimination and discouragement of membership on the facts of the

[21] Because of my resolution of the 8(a)(1) and 8(a)(3) issues, I would not reach the 8(a)(5) question.

case, it considered the motive of the company at length. From a series of earlier decisions [22] the Court established several guiding principles for assessing the motive of employers.

First, conduct may be deemed "inherently destructive" of employee rights when the effect on employee interests is so severe that the conduct carries its own indicia of antiunion animus. *Id.* at 33, 87 S.Ct. 1792. Although the Court has never precisely defined "inherently destructive", I would say that the term denotes conduct that thwarts the basic policies of the Act. For example, action that frustrates the process of collective bargaining or the future of unionization at a plant thwarts congressional goals embodied in sections 7 and 8. Such behavior might lead to the finding of an unfair labor practice, depending on the justifications offered by the company for the behavior. On the other hand, conduct merely influencing workers' ability to maintain their bargaining demands does not reach the viability of the process of collective bargaining and should not be labeled "inherently destructive". *American Ship Building Co.* v. *NLRB*, 1965, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855, Note, 85 Harv. L.Rev. 680, 683 (1972).

When the behavior of the company begins to frustrate the basic policies of the Act and by its nature demonstrates anti-union animus, direct proof of motive is not required. The Board may infer the illegal intent and find an unfair labor practice even if a business justification exists for the company's action. *Id.* at 34, 87 S.Ct. 1792.[23] Whenever the infringement of employee interests

[22] The Court relied on *NLRB* v. *Brown*, 1965, 380 U.S. 278, 85 S.Ct. 980, 13 L.Ed.2d 839; *American Ship Building Co.* v. *NLRB*, 1965, 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855; and *NLRB* v. *Erie Resistor Corp.*, 1963, 373 U.S. 221, 83 S.Ct. 1139, 10 L.Ed.2d 308.

[23] This method of assessing intent developed in *Erie Resistor*. It merely applies the well-established principles that a person intends

is more than "comparatively slight" and the company asserts a business justification, the Board must balance the respective interests in order to draw a correct inference about the real motive of the employer. *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. at 33, 87 S.Ct. 1792; *NLRB* v. *Brown*, 1965, 380 U.S. 278, 286, 85 S.Ct. 980, 13 L.Ed.2d 839; *NLRB* v. *Erie Resistor*, 1963, 373 U.S. 221, 228-29, 83 S.Ct. 1139, 10 L.Ed.2d 308.

Second, if the damage to the employee rights is only "comparatively slight" and the company offers a business justification for its conduct, the activity will be considered prima facie lawful. An unfair labor practice may then be found only upon proof of actual anti-union motive. *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. at 34, 87 S.Ct. 1792.

Third, whenever any damage, however slight, occurs to the rights of employees, the burden shifts to the employer to come forward with a legitimate business justification for his conduct. The burden of going forward with this evidence shifts because the employer has greater access to proof about his motives. *Id.* at 34, 87 S.Ct. 1792.

These principles also apply to alleged violations of section 8(a)(1). *See NLRB* v. *Fleetwood Trailers Co.*, 1967, 389 U.S. 375, 378, 88 S.Ct. 543, 19 L.Ed.2d 614; *Inter-Collegiate Press* v. *NLRB*, 8 Cir. 1973, 486 F.2d 837, *cert. denied sub nom., Bookbinders Local No. 60* v. *NLRB*, 1974, 416 U.S. 938, 94 S.Ct. 1939, 40 L.Ed.2d 288. The basic elements of an 8(a)(1) unfair labor practice therefore are a) employer action that effectively interferes with, restrains, or coerces employees in the exercise of their section 7 rights and b) intent by the employer to interfere with, restrain, or coerce the right of employees to organize.

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the natural and probable consequences of his conduct, 373 U.S. at 227, 83 S.Ct. 1139.

C.

Application of these legal principles to the instant facts reveals an unfair labor practice under section 8(a)(1) of the Act. To begin with, Johns-Manville effectively restrained and coerced the employees who attempted to exercise the right to unionize and the right to bargain collectively at the New Orleans plant. The workers lost their jobs and incomes because they bargained until they reached an impasse. The lesson is clear. These workers and their replacements will be less likely to unionize and bargain in the future because they experienced the economic deprivation imposed by the company. Consequently, the first element of an 8(a)(1) unfair labor practice is met.

Restraint or coercion alone is not sufficient, however, to establish a violation of the Act. All economic pressure by employers coerces or restrains workers, and most of it influences the future exercise of section 7 rights by employees. The pressure is illegal only if it results from an improper, anti-union motive. In this case, an analysis of the company's motive justifies the Board's conclusion that an 8(a)(1) violation occurred.

First, *Great Dane* requires resolution of the question whether the coercion and restraint of the worker's rights were more than "comparatively slight". If the effects were only slight, then *Great Dane* would prohibit the inference of an impermissible motive on the facts of this case. If the effects were more than slight, as the administrative law judge and the Board concluded, then the Board would be able to infer the illegal motivation if the company could not justify its conduct on other grounds. I agree with the Board's conclusion, because the company's conduct will have a serious impact on the future of unionization and collective bargaining at the plant, as demonstrated by comparison of these facts with analogous cases. For example, *NLRB* v. *Erie Resistor*

Corp., 1963, 373 U.S. 221, 83 S.Ct. 1139, 10 L.Ed.2d 308, found an unfair labor practice when the company granted twenty years of superseniority to permanent replacements. This action imposed a substantial discrimination on those exercising their rights because it a) affected all pre-strike workers without regard to whether they had engaged in improper conduct or economic warfare against the company, b) imposed an obvious detriment on those exercising their section 7 rights and an obvious benefit on the replacements, c) dealt a crippling blow to the exercise of the section 7 rights in the future, and d) created an unnatural cleavage in the bargaining unit that would have lasted beyond the duration of the strike. *Id.* at 230, 83 S.Ct. 1139.

Similarly, consider the lockout and permanent replacement of the Johns-Manville production workers. (a) All of the workers were replaced, not just those who allegedly engaged in illegal economic warfare by creating production disruptions. (b) The workers who exercised their section 7 rights by unionizing and bargaining collectively lost their jobs, for a substantial period and certainly beyond the duration of the labor dispute. This was a detriment not imposed on those who did not exercise their section 7 rights; the replacements were given jobs. (c) The replacements crippled the future exercise of worker rights. The bargaining unit was entirely replaced with workers who had not unionized or bargained. The economic devastation to those who did unionize and bargain would have a chilling effect upon the new workers. Furthermore, in a depressed economy few of the new employees left their jobs within a year of the lockout. Few of the locked-out employees were reinstated. Consequently, the chance for the locked-out workers to exercise section 7 rights was remote.[24] (d) To the extent that any

[24] *See* note 20 *supra* for a comparison of the rights of a replaced worker with those of a fully employed worker.

of the workers were reinstated, the company created a permanent cleavage in the bargaining unit between those who exercised their section 7 rights and those who helped management crush the exercise of those rights. This cleavage would have inhibited future unionization and collective bargaining in the plant. In short, the effect of Johns-Manville's permanent replacement of the locked-out workers was just as serious as the effect of the company action in *Erie Resistor*. The Board therefore correctly found that worker rights were more than slightly impaired.

This conclusion is buttressed by a comparison of the facts of this case with cases involving company action having only slight impact on worker rights. In *NLRB* v. *Brown*, 1965, 380 U.S. 278, 85 S.Ct. 980, 13 L.Ed.2d 839, for example, the Court permitted members of a multiemployer bargaining group to lock-out and temporarily replace all of its workers when the workers at only one store launched a strike. The lock-out and temporary replacement of workers had only a slight effect on worker rights. (a) The coercion was only temporary; it did not threaten permanent employment. (b) The action did not harm future unionization, because the effects of the action did not extend beyond the end of the dispute and because the company retained its character as a union shop. (c) The members could have ended the detriment to their interests by agreeing on a new contract that was better than their previous contract. *Id.* at 288, 85 S.Ct. 980.

None of these facts existed in the Johns-Manville dispute. (a) The coercion was not temporary. The threat of permanent loss of employment at the plant was substantial because the workers had to be carried on the hiring list for only six and a half months.[25] (b) The

[25] *See* note 20 *supra*.

future of unionization and collective bargaining in the plant was placed in substantial doubt. The company hired an entirely new group of workers who realized that they had their jobs only because the company replaced the unionized workforce. (c) The Johns-Manville workers could not have ended the effect of the employer's action by agreeing to the company's terms. Indeed, the workers never had the opportunity to avoid the permanent replacement by modifying their bargaining position; the company replaced them without notification. This is an important factor in assessing the company's motive. If management had notified the union that it would replace the workers unless a settlement could be reached, the motive would logically have been directed toward settlement of the dispute. By proceeding without notification the company made clear its motive to rid itself of these unionized workers. Once the replacement occurred, the employees could no longer have ended their economic distress by settling the dispute. They could only have gained access to a hiring waiting list during a sluggish period of the economy. The effect of company action on the rights of these workers therefore does not resemble the effect identified by the Supreme Court in *Brown* as "slight".

In another case in which a court found company action to affect worker rights only slightly, the company also replaced the workers temporarily. The Eighth Circuit analyzed the facts of *Inter-Collegiate Press* v. *NLRB*, 8 Cir. 1973, 486 F.2d 837, according to *Brown*. After exploring the factors we have referred to, the Court of Appeals added an element further suggesting that the company acted without anti-union animus: *Inter-Collegiate Press* retained the union's security provisions during the dispute. In this case, on the contrary, the company cancelled the security provisions, which not only distinguishes these facts from *Inter-Collegiate Press* but also

supports directly the inference that the company acted with anti-union animus.

Comparison of the Johns-Manville facts with the cases in which courts have considered the extent of damage to worker interests and rights supports the Board's decision that the effect on worker interests here was more than comparatively slight. By permanently replacing the entire workforce without notification, Johns-Manville inflicted substantial and longlasting damage on worker interests and rights. Because this destruction is the obvious and natural consequence of the company's conduct, the inference arises that the company intended the effects.[26]

Second, *Great Dane* requires a two-fold examination of the business justifications asserted by the company to explain its motives. The legitimacy of the proposed justifications must be established. In *NLRB* v. *Fleetwood Trailer Co.*, 1967, 389 U.S. 375, 379-80, 88 S.Ct. 543, 19 L.Ed.2d 614, for example, the Court rejected consideration of an efficiency justification because the company, as a matter of fact, had instituted no changes in its production process. The legitimate justifications must then be weighed against the damage to worker interests to reveal the real motive of the employer. *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. at 33, 87 S.Ct. 1792.

The primary justification submitted by Johns-Manville is invalid, as a matter of fact. The management says

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[26] The employer contends that the workers' rights were not seriously affected by arguing that the Supreme Court permitted the permanent replacement of striking workers in *Mackay*. The argument is unpersuasive. *Mackay* did not consider the effect of the replacement on the workers' rights; it did not attempt to infer an illegal intent on the part of the employer. The case pre-dates the legal tests established in *Brown* v. *Erie Resistor* and *Great Dane* by more than 20 years. Consequently, it offers little guidance as to whether the Johns-Manville facts demonstrate more than a single impairment of worker interests.

that it hired permanent replacements rather than ending the lock-out because the workers continued to threaten production disruptions. This phantom fear is based on speculation. As emphasized earlier, no proof exists that more than one, two, three or, at most, a handful of disgruntled employees caused disruptions during August through October 1973. These mavericks may have found other employment during the lock-out. The disruptions therefore might have ceased upon reinstatement of workers available in April. Fear of a recurrence of the disruptions of October 22 is also unreasonable. The workers had been laid off for nearly six months, a substantial cooling-off period. The economic hardship imposed during that time might have made a steady pay check and a job more appealing to the employees than the unemployment compensation and convulsive disruption. Furthermore, the workers neared the end of their six-month eligibility for unemployment benefits. The prospect of the loss of that source of income could have provided additional incentive for the workers to return peaceably to work while the negotiations for a new contract continued. But they never received the opportunity to return because the company permanently replaced them. Without notifying the union of the need for the experienced workers or of the prospect for permanent replacement, the company has no legitimate factual basis to declare that sabotage would have recurred with the return of the employees. The more reasonable inference is that production of about 110 tons a day of paper would have resumed.

Two additional justifications asserted by the company do have sufficient legitimacy to enter the balance required by *Great Dane*. First, the company had an interest in maintaining its bargaining posture and in pressuring workers to accept its position. Second, it had an interest in maintaining the profitability of its enterprise by continuing production despite the economic warfare with

the union. According to the company, both of these interests could be satisfied in April 1974 only by permanent replacement of the workforce. According to the company, four courses of action were open to the company when the impasse continued in April. It could have continued its lock-out without replacement of any kind, which would not have satisfied the first interest. It could have continued the lock-out with temporary replacements, which also would not have satisfied the first interest.[27] It could have reinstated the locked-out workers and continued bargaining, which would have satisfied the first but not the second interest. Thus, management concluded that only by permanently replacing the workers could the company maintain its profits while continuing to pressure the union to capitulate.

The company omits a fifth course and thereby undermines the asserted innocence of its motives in April 1974. The company could have notified the union that it was contemplating permanent replacement of the workers to reverse the financial losses incurred while using temporary replacements. Notification would have demonstrated a true interest in pressuring the union to accept the company proposal because it would have given the union leadership a chance to avoid the damage that permanent replacement threatened to employee interests. By taking this action, the company could have satisfied both of its legitimate interests more effectively than by using the permanent replacements. Regarding profitability, the previous workforce could have manufactured the paper more efficiently than a new crew that needed training and orientation. Regarding maintenance of the bargaining position, a settlement induced by the notification would

[27] Operation of the plant with temporary replacements proved unprofitable. The company lost $300,000 a month in pre-tax profits from October 1973 through March 1974. Because of reduced output from the plant, management had to curtail production at two other installations that relied on the New Orleans paper.

have satisfied this concern completely whereas the permanent replacement alternative left the company with an impasse and a new, untested crew of workers that might or might not have performed satisfactorily. If they had not, the company would still have faced the impasse. Management's disregard for the best approach to protect its interests therefore casts doubt on whether these concerns actually motivated company action. In balancing the various effects to reveal the motive of Johns-Manville, this failure diminishes the weight assigned to the two interests asserted by the company.

Finally, *Great Dane* requires a comparison of the asserted business justifications and the damage inflicted on worker rights and interests. On the facts of this case the damage to worker rights dominates the alleged justifications. The damage flows naturally from the permanent replacement of the workers. The inference therefore arises that the company intended the consequences. Johns-Manville could have rebutted this inference by showing that business justifications motivated its conduct and that the damage to worker rights was therefore an unintended effect. The company has not met this burden, however because it failed to pursue the avenue that would have best protected its profits and supported its bargaining position. Instead, it adopted an approach that provided less protection for its interests and more damage to the worker's rights. I can only conclude that such conduct was motivated by anti-union animus.[28] The com-

[28] This conclusion is reached without an attempt to balance the economic weapons available to the parties. The company argues at length that the NLRB issued the order in this case only because it found the company's economic warfare to be "too effective". This argument legally misses the point. The balancing mandated by *Erie Resistor* and *Great Dane* is not pursued for its own sake. It is merely a method of determining whether the company acted with an illegal motive. If the company's behavior and the results of that behavior effectively promote the company's bargaining position and do not inhibit the future exercise of section 7 rights by workers,

pany therefore committed an unfair labor practice under section 8(a)(1) of the Act by permanently replacing its locked-out workers without notification.

D.

The company also violated section 8(a)(3) of the Act. As pointed out in subsection III-B of this opinion, an 8(a)(3) unfair labor practice includes three elements: (a) discrimination with regard to hiring or tenure of employment, (b) encouragement of union membership, and (c) intent to encourage or discourage worker unionization. 388 U.S. at 32-33, 87 S.Ct. 1792. Here, the first element is satisfied because Johns-Manville hired the replacements while failing to reinstate the locked-out workers. This is discrimination with regard to hiring. The analysis of the alleged 8(a)(1) violation demonstrated that the discrimination will discourage union membership.[29] Both the locked-out workers and the permanent replacements will be less likely to unionize at the Johns-Manville plant in the future. The replacements have seen the economic deprivation that results from unionization. The replaced workers have no positions at the plant and will probably not be reinstated in the future. They will therefore have little opportunity to join or to retain union representation for the bargaining unit. The intent element is satisfied by the analysis of the

then an illegal motive cannot be inferred. On the other hand if the conduct also tends to coerce or restrain the future exercise of those rights, regardless of its "effectiveness" in promoting the bargaining position of the company, the basis for inferring the impermissible motive exists. Here, the destruction of rights is so significant and the company's supposed interests are so ineptly pursued that the company must have intended to thwart future unionization and collective bargaining at its plant.

[29] *See* subsection III-C *supra*.

company's intent to violate section 8(a)(1).[30] Thus the violation is established and the Board's order justified.

IV.

In summary, I would enforce the order of the National Labor Relations Board. As a matter of fact and law, no "in-plant" strike occurred to justify the replacement of the workers. The replacement of them without notification and in the absence of a strike violates sections 8(a)(1) and 8(a)(3) of the Act. Because the majority has approved these violations and permitted serious damage to worker rights and congressional policy, I cannot agree with the decision of the Court.

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[30] *Id. Great Dane*, the basis for the preceding intent analysis, held that the employer had committed an unfair labor practice under section 8(a)(3).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 76-2444

JOHNS-MANVILLE PRODUCTS CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

JUDGMENT

Before: WISDOM, GEE and FAY, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by Johns-Manville Products Corporation, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, successors, and assigns on May 6, 1976, and upon a cross-examination filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on March 29, 1977, and has considered the briefs and transcript of record filed in this cause. On August 19, 1977, the Court being fully advised in the premises, handed down its opinion granting the petition for review and denying the cross-application.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that enforcement of the order of the National Labor Relations Board directed against Johns-Manville Products Corporation, its officers, agents, successors, and assigns, be and it hereby is denied, and costs

in this matter are hereby awarded to Johns-Manville Products Corporation.

ENTERED: August 19, 1977

Issued as Mandate: Nov. 3, 1977

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk

October 26, 1977

TO ALL PARTIES LISTED BELOW:

NO. 76-2444—JOHNS-MANVILLE PRODUCTS CORP. v. NATIONAL LABOR RELATIONS BOARD

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition() for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

By /s/ Brenda M. Hauck
Deputy Clerk

** on behalf of the intervenor and the respondent, Johns-Manville Products Corp.,

cc: Mr. John D. O'Brien
Mr. Elliot Moore
Messrs. Paul J. Spielberg
Howard E. Perlstein
Mr. Voctor H. Hess, Jr.

APPENDIX D

223 NLRB No. 189

MJP
D-1151
New Orleans, La.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 15-CA-5238

JOHNS-MANVILLE PRODUCTS CORPORATION

and

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On April 10, 1975, Administrative Law Judge Elbert D. Gadsden issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order in its entirety.

Respondent is engaged in New Orleans in the manufacture of dried felt, which is a crude form of paper used as a base for asphalt roofing products. The Union

[1] As the record and the briefs adequately present the positions of the parties, Respondents' request for oral argument is hereby denied.

was certified in 1964, and since that time the parties have entered into four successive 2-year collective-bargaining agreements, the latest of which terminated on October 12, 1973. The latest contract negotiations began on September 11, following the Union's earlier 60-day notice of termination. Before and after this notice Respondent observed an unusual number of paper breaks, found a considerable number of pieces of scrap metal in conveyers, and improper adjustments with the dryers, causing disruptions in production. Respondent requested the Union's assistance in correcting the situation, but the Union took no affirmative action. Respondent became increasingly concerned about the above-described incidents and decided that if they continued, the operation at this particular plant could not sustain itself. The plant was shut down on October 12 and remained closed until about October 22. In the interim Respondent maintained a complement of employees, whose duties were to inspect, maintain, and repair all of its machinery to ascertain any malfunction in order to determine whether or not it was machine failure which would cause breaks in its paper.

On October 22 Respondent reopened the plant but on that date several machines had broken down and Respondent again noticed innumerable paper breaks; and on this particular day, production dropped from a normal daily production of 110 tons to about 13½ tons. At this point, Respondent decided that it could no longer sustain operations in the plant without endangering lives and property and decided to lay off its production workers that day.

Respondent met with the Union and employees on October 31 and informed them that the plant would remain closed until a contract was reached. On November 14, 1973, Respondent submitted its last proposal which provided for a 3-year contract, a wage increase, and other

benefits, plus a no-strike clause, no slowdown, no work stoppage, and no-lockout provisions. Respondent resumed production on November 14 using salaried personnel from other plants, supervisors, and temporary employees, until April 7, 1974.

The record shows that during the same period Respondent experienced a high demand for roofing materials which it was not able to supply, thus creating the fear of loss of customers.

In March 1974, Respondent considered the feasibility of hiring permanent replacements. Before doing so, Respondent's officials met with the Union, as they had been doing in the interim period, to attempt to resolve the difficulties at the New Orleans plant. No resolution came about, so Respondent went ahead with plans to hire permanent replacements. Respondent did not want to rehire its own employees in view of the history of sabotage and disruptions during the other periods of negotiations and the fact that its employee complement at that time was not producing efficiently, it was losing a substantial amount of sales, and the operation at New Orleans was having an adverse effect on other plants operated by Respondent. The first replacements were hired in April 1974, and by about mid-June 1974, the entire work force was replaced.

We agree with the Administrative Law Judge, for the reasons more fully set forth in his decision, that Respondent's unilateral act of hiring permanent replacements on April 8, 1974, "without consulting or notifying the Union or the employees of such intention . . . rendered more than a slight adverse effect upon the employees' protected rights, as compared with Respondent's legitimate business purpose in its lockout bargaining leverage" and this conduct violated Section 8(a)(3) of the Act. The permanent replacement of all unit employees was also a violation of Section 8(a)(5), as it completely destroyed

the bargaining unit. In the circumstances herein and in the complete absence of any unfair labor practices on the part of the Union, the employees and/or their lawfully designated representative have the right, as a matter of law, to engage in effective and responsible negotiations over their terms and conditions of employment. When Respondent elected to replace them permanently, without any warning, consultation, or negotiation, such action destroyed that very right itself, and constituted a withdrawal of recognition of their duly designated bargaining representative in violation of Section 8(a)(5) and (1) of the Act. We also agree with the Administrative Law Judge that the evidence in this record is insufficient to support a conclusion and finding that Respondent's employees engaged in an in-plant strike or in concerted improper conduct so as to enable it to replace or discharge its entire complement of production employees. Thus, we agree with the Administrative Law Judge that the failure of the Respondent to conduct an investigation to ascertain responsibility for such disruptive activities is sufficient to warrant a finding that Respondent did not have reasonable and sufficient objective considerations upon which to conclude that "any or all of its employees" were engaged in improper conduct so as to justify discharge of all production employees.[2]

In affirming the conclusions of the Administrative Law Judge in their entirety, we note that he specifically dealt with the issue of the effects of the legality of Respondent's lockout and the utilization of temporary employees, from about November 14, 1973, until April 8, 1974, when it began the permanent replacement of its entire

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[2] We agree with the Administrative Law Judge that *Raleigh Water Heater Mfg. Co., Inc.*, 136 NLRB 76 (1962), and *Massey Gin and Machine Works, Inc.*, 78 NLRB 189 (1948), relied on by the Respondent, are distinguishable, as is *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

work force. In this respect, the Administrative Law Judge found that since the collective bargaining of the parties was at an impasse in October 1973, Respondent could legally shut down its plant and lock out its employees because it was done for a legitimate and substantial business purpose without antiunion motivation. We agree with the Administrative Law Judge, contrary to our dissenting colleague, that the lockout and subsequent resumption of operations on November 14, 1973, on a reduced scale with temporary employees not covered by the expired contract, which were transferred from some of its other operations, and others which were secured from an independent contractor, did not violate Section 8(a)(3) and (1) of the Act, for these same reasons fully set forth in our decision in *Ottawa Silica Company*.[3] The Administrative Law Judge found, and we again agree, that "such operation is legally permissible because the evidence of its impact upon the exercise of the employees' protected rights was slight, as compared to the Employer's legitimate use of the lockout and continued operation with temporary replacements."

Respondent has adequately demonstrated that the lockout was not based upon antiunion considerations but was rather based upon legitimate and substantial business reasons. The lockout was intended to and did serve a legitimate business end. Respondent had a reasonable apprehension that if it resumed normal business production with its own employees substantial disruptions in its productive process would soon take place against its substantial economic interest and those of its customers and to the great detriment of the New Orleans operation. This lockout was legal because of the overriding business purposes and because of the vital interest and convenience of the Company. Respondent had a good-faith anticipation of almost simultaneous disruptive ac-

[3] 197 NLRB 449 (1972).

tion by its employees. The lockout and the use of temporary employees was not designed to destroy the employees' rights or the capacity of the Union to represent them. Respondent's action was designed solely to further legitimate business interests and it has established by a preponderance of the probative and substantial evidence that it had no antiunion motivation in what it did but rather it was motivated solely by legitimate objectives.[4] Certainly Respondent was faced with unusual operational problems and hazards and most probable and irreplacable economic loss had it resumed operating the plant without completing an agreement with the Union. Having found therefor that following a bargaining impasse an employer has the right to replace locked-out employees temporarily and continue operations, absent an antiunion motivation, an employer does not violate the Act by hiring temporary replacements to continue operations during an otherwise lawful lockout.

Accordingly, we adopt the Administrative Law Judge's recommended Order in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Johns-Manville Products Corporation, New Orleans, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

Dated, Washington, D.C., May 6, 1976.

BETTY SOUTHARD MURPHY, Chairman

JOHN A. PENELLO, Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

[4] *WGN of Colorado, Inc.*, 199 NLRB 1053, 1056, 1057 (1972).

MEMBER JENKINS, dissenting in part:

I join my colleagues in finding that Respondent violated Section 8(a) (3), (5), and (1) of the Act by permanently replacing its entire complement of locked-out unit employees. However, contrary to my colleagues, I would find in accord with my dissenting opinions in *Ottawa Silica Company*, 197 NLRB 449 (1972), and *Inter Collegiate Press, Graphic Arts Division-Sargent Welch Scientific Co.*, 199 NLRB 177 (1972), that Respondent violated Section 8(a) (1) and (3) by operating its plant with temporary replacements for its locked-out employees from November 1973 until April 1974, when it discriminatorily replaced the locked-out employees with permanent employees.

The Union was certified on October 27, 1964, as the exclusive collective-bargaining representative of the unit employees. Since that time, the parties have entered into four successive 2-year collective-bargaining agreements from October 12, 1965, through October 12, 1973. On September 11, 1973, the parties commenced negotiations for a new contract. Several meetings were held but no agreement was reached. On October 31, 1973, Respondent informed the Union that the plant would be shut down until the contract could be negotiated and that the Respondent was not willing to let the unit employees continue to work without a contract. On that day, Respondent locked out all members of the bargaining unit. Notwithstanding the statement that the plant would be shut down until a contract could be negotiated, Respondent resumed operations within 1 or 2 weeks of the October 31 plant closure, utilizing approximately 35 salaried personnel from various corporate locations and a contract labor force consisting of approximately 32 employees.[5]

[5] Several of these temporary employees became permanent employees of Respondent, when it was decided to replace the locked-out employees.

The Administrative Law Judge found that the use of temporary employees during the lockout was legally permissible "because I find the evidence of its impact upon the exercise of the employees' protected right to be slight, as compared to the employer's legitimate use of the lockout and continued operation with temporary replacements," citing *Inter Collegiate Press, supra.* Member Fanning and I dissented in that case as well as in *Ottawa Silica Company, supra*, and no worthwhile purpose would be served by a repetition of the analysis enunciated in those opinions. It suffices at this point to state that the issue posed in the instant case was given judicial attention and decided in *Inland Trucking Co. and Wesley Meilahn, Co-partners d/b/a Oshkosh Ready-Mix Co., et al.*, v. *N.L.R.B.* 440 F.2d 562 (C.A. 7, 1971), cert. denied 404 U.S. 858 (1971). It is significant that the Supreme Court denied on appeal from the circuit court's decision, and that a majority of the Board has never in any case expressed an unwillingness to abide by that decision. In accordance with the Court's reasoning there, I would find that Respondent's use of replacements for a prolonged period was inherently destructive of the rights of its locked-out employees and therefore violative of Section 8(a) (1) and (3) without regard to any claim that such conduct was motivated by business considerations.

However, even if the test of business justification is applied it is clear that Respondent has not succeeded in presenting evidence of legitimate and substantial business justification for its continued operation during the lockout. This is certainly not the type of situation where there was a defensive lockout to avoid injury to customer relations caused by a strike occurring while unfinished work was in the shop,[6] disruption of general op-

[6] *Betts Cadillac Olds, Inc.*, 96 NLRB 268 (1951).

erations caused by unexpected intermittent work stoppage,[7] spoilage of materials by sudden strike,[8] or threats to the preservation of a multiemployer bargaining unit.[9] Indeed there is no evidence in the instant record that the Union threatened to strike. Moreover, with respect to Respondent's alleged fear of disruptions, the Administrative Law Judge specifically found that the evidence fails to establish that the Union and/or any plant employee, independently or through a conspiracy, actually engaged in sabotage or disruptive activities. The Administrative Law Judge further noted that the activities could have been carried out by a single individual, acting on his own, and that the Union emphatically denied that its unit employees were engaged in disruptive activities at the plant. Thus my colleagues' conclusionary finding that Respondent's conduct was justified by business considerations is based on no more than Respondent's desire to continue operations. In my view, this position is untenable, and I would find that Respondent has presented no evidence of legitimate and substantial business justification for its discriminatory conduct.[10]

Finally, Respondent's action with respect to the lockout and the reopening of the plant have no relation to legitimate business purposes but rather demonstrate animus towards the represented unit employees. As previously stated, Respondent announced that it would shut the plant down until a contract was reached. Despite this rather definitive statement, the plant closure lasted only 1 or 2 weeks. This rapid resumption of the oper-

[7] *International Shoe Company*, 93 NLRB 907 (1951).

[8] *Duluth Bottling Association*, 43 NLRB 1335 (1943).

[9] *N.L.R.B.* v. *Truck Drivers Local Union No. 449 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL (Buffalo Linen Supply Co.)*, 353 U.S. 87 (1957).

[10] See *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

ations indicates that Respondent's real intention was to close its plant only to members of the bargaining unit. Further, permanent replacements for the locked-out employees were hired in April 1974, and the record indicates that Respondent discussed the possibility of replacing the unit employees as early as January 1974, despite the fact that the Union notified Respondent that the union employees were willing to work without a contract. Furthermore, the record in the instant case lacks many of the alleged mitigating circumstances that existed in *Inter-Collegiate Press*. In that case, the employer made it clear that the replacements were to be used only for the duration of the strike and the employer offered to abandon the lockout and the use of temporary help if the Union agreed not to strike. No such conciliatory action on the part of the Respondent are present in the instant case.

As I have already stated, I would find that Respondent's conduct was not only inherently destructive of protected employee rights, but was also without sufficient economic justification. Accordingly, I would find that Respondent's lockout and concomitant operation with temporary replacements violated the Act.

Dated, Washington, D.C.

May 6, 1976

HOWARD JENKINS, JR., MEMBER

NATIONAL LABOR RELATIONS BOARD

JD-182-75
New Orleans, La.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case No. 15-CA-5238

JOHNS-MANVILLE PRODUCTS CORPORATION

and

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, AFL-CIO

I. Harold Koretsky, Esq., and *Robert E. Sheahan, Esq.*, for the General Counsel.

John D. O'Brien, Esq. (*Seyforth, Shaw, Fairweather & Geraldson*), of Washington, D.C. for the Respondent.

DECISION

Statement of the Case

ELBERT D. GADSDEN, Administrative Law Judge: Upon an original and an amended charge of unfair labor practices, filed on April 22, 1974 and April 25, 1974 and July 31, 1974, respectively, Ernest J. Rousselle, international representative, for the Oil, Chemical and Atomic Workers International Union, AFL-CIO, herein called the Union, against Johns-Manville Products Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board issued an original and an amended complaint against Respondent on August 5, 1974 and October 9, 1974, respectively, alleging that

Respondent had engaged in unfair labor practices in violation of Section 8(a) (1) and (3), Section 8(a) (1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act.

The Respondent filed an answer and an amended answer on August 9, 1974 and October 15, 1974, respectively, denying that it engaged in any unfair labor practices in violation of the Act.

The hearing in the above matter was held before me at New Orleans, Louisiana on December 4, 5 and 6, 1974. Briefs have been received from counsel for the Respondent and counsel for the General Counsel, respectively, and have been carefully considered.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

Findings of Fact

I. Jurisdiction

Respondent, is now, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of Delaware, with a manufacturing plant located in New Orleans, Louisiana (the only facility involved herein), where it is engaged in the manufacture of asphalt shingles and rolled roofing.

During the past 12 months, a representative period, Respondent purchased and received goods and materials valued in excess of $50,000, which were shipped directly to Respondent in the State of Louisiana from points located outside the State of Louisiana, and correspondingly, during the same period, Respondent shipped products valued in excess of $50,000 from its New Orleans, Louisiana plant directly to customers located outside the State of Louisiana.

The complaint alleges, the answer admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Oil, Chemical and Atomic Workers International Union, AFL-CIO, herein called the Union, is now and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Background of the Dispute*

The Respondent manufactures an organic dried felt, which is a crude form of paper used as the base for asphalt roofing products. After this process is completed the paper is then sent to the Marrero plant of Johns-Manville in Savannah, Georgia and Los Angeles, California, where the asphalt processing is carried on. However as far as the plant in question is concerned, the end product is the result of a process whereby paper is initially mixed with water to a slurry, and then to that slurry is added a slurry made up of water and pulp wood. The then combined slurry is ground to a certain degree then passed on to a mesh wire, flattened and compressed to squeeze out moisture from 80 percent to approximately 55 or 60 percent, until the sheet is able to sustain its own weight. It is then processed across a conveyor belt on to dryer drums or rollers where it becomes drier and drier and all of the moisture is removed to 4 or 5 percent. It is then wound on a bull reel and cut into rolls of 36 inches, after which it is prepared for shipment.

The paper sheets can be broken during the manufacturing process through a lack of proper adjustment between the drier sections of the revolutions per minute which,

if not properly done, can be broken as a result of vibrations and tensions between the sections. Paper breaks may also occur as a result of being physically struck with the hand or an object. The paper can be broken also as a result of variations in the formula of the pulp wood slurry. In other words the end product can be damaged or broken at nearly any point along the pressing route or by improper formula mixtures or adjustments in the revolutions of the processing machinery.

The bargaining history of the parties shows that the locked out employees constitute the appropriate unit for purposes of collective bargaining, for which the Union was properly certified the exclusive collective-bargaining representative on October 27, 1964. Since that time, the parties have entered into four successive 2-year collective-bargaining agreements from October 12, 1965 through October 12, 1973.

However, prior to the expiration of its collective-bargaining agreement on October 12, 1973, the parties (Respondent and the Union) commenced negotiations for a new agreement on September 11, 1973. Nevertheless, after several bargaining sessions the current bargaining agreement expired on October 12 without the parties having reached a new agreement. Meanwhile, since September 1973, Respondent has complained to the union representative that it was experiencing an excessive amount of paper breaks in its manufacturing process and had been finding a considerable number of scrap metal in the conveyor and other manufacturing machinery, causing interruptions in production and downtime and resulting in substantial costs and losses in profits. Since these occurrences not only continued but became worse on October 22 or 23 of 1973, the Respondent said it issued a notice to its production employees advising them of the shutdown of the plant on October 31, 1973. The parties continued to negotiate without

reaching a bargaining agreement and the Respondent reopened the plant with temporary employees in mid-November 1973, which temporary employees were made permanent employees around April 1974, while the regular employees in the Union were still locked out.

The Respondent contends that it shut down its plant to avoid further damage to its manufacturing equipment and for the safety of plant personnel or persons in the vicinity; and that it ultimately employed permanent replacements in order to save its business operations at the plant. The Union contends that Respondent's hiring of permanent replacements was discriminatory and had a substantial discouraging effect upon union membership and activities, in violation of Sections 8(a)(3) and (1) and (5) of the Act.[1]

B. *The Negotiations out of which the Current Dispute Arose*

A composite of the credible evidence of record established that the Union and Respondent commenced negotiations for a new collective-bargaining agreement on September 11, 1973 with Mr. Ernest J. Rousselle, representative for the Union and spokesman for the employees, and Mr. Darrell Wells, employee relations director for the Respondent, as first-time spokesman for the Respondent in negotiating sessions. The union committee consisted of Mack Jordan, president of the local union, Donald Hall, chairman of GM group, Mr. Johnson, Sid Meggs, Charlie Ebeyer and Raymond Haisch. At this time the Union presented 19 proposals which it explained and held discussions on two of such items. The Company then stated that it would have a set of proposals to present at the next meeting on September 19.

On September 19 the bargaining parties met, during which time the Respondent presented six proposals and

[1] The facts set forth above are undisputed in the record.

had agreed to two or three of the Union's proposals. However, the Respondent proposed deleting the language in the present contract which required it to train employees in the maintenance department to do mechanic work and prohibited it from hiring mechanics from the outside. Respondent contended that the lack of sufficiently trained maintenance people was affecting its maximum productivity.

The Union opposed this change because it contended that it would affect the seniority rights of some employees with 25 or 30 years seniority by layoffs or reduction in force because of lack of qualifications, wherein such persons could be trained by Respondent and retained in employment. The Respondent also proposed a 3, rather than a 2-year contract as had been previously entered into. The Union was proposing a 1-year contract. The parties agreed to meet again on September 25, 1973. However, on September 19, 1973, the Respondent posted a notice on its bulletin board at the plant revealing, in large measure, the contents of the September 19 meeting, and more particularly, describing the issue on the change of language in the present contract as follows:

> As your Plant Manager I can honestly say that we have reached a critical point in out maintenance program. Our proposal is not double barreled with any underlying motives. Our proposal is simply necessary for our very existence. Contracting work out is not the answer because that is costly to the Company and it takes away from you people.
>
> In addition, our proposal does not threaten the present seniority provisions. Your Union bargaining committee feels that the Company will hire a skilled maintenance man for example, and then if a layoff would occur, the Company would claim that the newly hired man should stay because he is more qualified than a senior employee thereby forcing the

senior employee on layoff. This position is exactly what I meant when I said our proposal is *not* "double barreled." There is no way we intend to deny or not recognize your seniority. Furthermore, there is no reasonable man who would uphold the Company where the Company laid off, for example, a mechanic with 15 years of Felt Mill experience and seniority and kept a mechanic with 3 years of Felt Mill experience and seniority. Even if the qualifications were "approximately equal" the present language states seniority will be the determining factor and therefore you are protected. Your bargaining committee also stated we have not trained in the past and we are not training now. I have already talked about that point. We simply need immediate relief in the maintenance area—more help and more skills now.

In this notice the Respondent also advised that it was proposing to reduce the 30 days to 5 days for the time limit for filing a grievance; to revise the language concerning strikes and lockouts; and that the collective-bargaining agreement should be for 3 years to provide flexibility and allow for planning for long term improvements. It also advised that the next negotiating session was scheduled for October 3, 1973.

The parties met in negotiations session again on September 25, 1973, wherein they reached an agreement on Company's Proposal No. 1 and held discussions regarding the problem of training maintenance employees, a 3-year agreement, and the deletion of the contract provision dealing with strike and lockout. When the Union asked the Respondent why did it want to delete the language on the no-strike, no lockout agreement, it simply replied that they wanted to take the garbage out of the contract; that this provision was not needed. The Union again reiterated its concern to the Respondent

on the matter of Respondent hiring maintenance people off the street who might subsequently replace older employees in the event of a layoff. The Company's position was that it needed trained men "now" and not in the "future." The Union contended that since Respondent had mechanics and mechanic helpers, the mechanic helpers could progress into the mechanic job when such a job became available; but that it had no electricians, no electrician helpers, no machinist helpers and no welder helpers, and therefore, the Company was obligated to train people for these jobs. The Company maintained its position for a 3-year agreement and the parties agreed to meet again on October 3, 1973.

Prior to the scheduled October 3 meeting, Mr. Rousselle said he was informed by Mr. Jordan that Mr. Weil had accused him and members of the Union of participating in disruption of operations of the plant (the breaking of paper and putting foreign materials into its machinery process). When the parties met on October 3, 1973, Mr. Rousselle said he expressed his concern about this accusation and further explained to company representatives that several months earlier, the president of the local union had brought in a piece of metal approximately 6 inches wide and 9 to 10 inches long which he described and took to the Respondent, advising it that the metal was found in the pulp which was purchased from the concern from which Respondent was purchasing its scrap paper or wood chips; and that Mr. Weil then stated that Respondent was purchasing paper chips from any place they could get it and that Respondent was not accusing the employees of causing the disruptions in the operations as a result of the foreign materials.

Mr. Rousselle said he further advised company representatives that he would not tolerate the employees participating in any type of disruptive procedures. Then Mr. Wells said the Respondent was not going to tolerate these

disruptive acts and that the Respondent had posted some safety regulation signs on the board in the plant which the employees had torn down. The parties did not have any discussions on the no-strike, no-lockout provisions in the 1967, 1969, nor the 1971 negotiations between the Respondent and the Union. The parties then agreed to meet again on October 11, 1973.

The parties met on October 11 at which time the Respondent again proposed a deletion of the language relating to training of employees for maintenance and boilerhouse jobs, as well as the revision of the no-strike, no lockout provision; it proposed a wage increase of 17 percent across-the-board, each year for a 3-year agreement; and it made some other proposals relative to service pension credit. (See General Counsel's Exhibit Nos. 10 and 11). After counterproposals made by the Union which were unacceptable to the Respondent, the parties could not reach an agreement on a contract and they agreed that the utilization of a mediator might be helpful since the current contract expired on the next day (October 12, 1973).

The parties succeeded in obtaining the services of Mr. Bates, a mediator, on October 12, 1973. Mr. Bates had assisted the parties in past negotiations. When the parties could not reach an agreement with the assistance of the mediator, the Company through its spokesman, Mr. Wells, (Respondent) notified the Union that they were terminating the agreement, that they would no longer honor the Union's security provision and the arbitration procedures or any other contractural obligations which they had previously adhered to. The Respondent subsequently reduced its termination announcement to writing (General Counsel's Exhibit No. 12). Mr. Rousselle advised Respondent that the Union wanted the opportunity to negotiate further prior to Respondent's effectuating the substance of its notification, and he further advised

Mr. Wells that he did not know whether Respondent could legally and unilaterally revoke the Union's security provisions but he would check into the matter with his attorney. Mr. Wells then stated that he was not going to tolerate any slowdown or harassment and Respondent presented the Union with the written notice (General Counsel's Exhibit No. 12) which Mr. Weil read as follows:

> Dear Mr. Jordan and Mr. Rousselle:
>
> As you know, under Article XXVI of our 1971-1973 contract, such agreement remained in full force and effect to and including October 12, 1973.
>
> This will serve to notify you that we are no longer willing to continue to honor any contractural obligations whatever after midnight, October 12, 1973. We will, of course, continue to negotiate with you concerning wages and working conditions applicable during the period prior to the execution of any new contract and the terms of any new contract.
>
> Since we will no longer have any contractural obligations, this will also serve to notify you of the following:
>
> 1. Since Article III entitled Union security is no longer a contractural obligation, union membership is no longer a condition of employment at this Plant and in addition, we will no longer deduct union dues and/or initiation fees from the paychecks of any of our employees; and
>
> 2. We shall no longer refer disputes which cannot be resolved between us to impartial third parties. This includes without limitation, referral of certain disputes to an impartial Industrial Engineering concern pursuant to Ar-

ticle XVI, Section 69 of the old contract and referral of general grievances to arbitration pursuant to Article XV.

With regard to this paragraph, any action taken by the Company will not be subject to arbitration at any future date if the Company's action is taken during the period of time from midnight, October 12, 1973, until a new agreement is signed by the parties.

As this meeting ended the parties did not agree on any future meetings.

Subsequently the Union received a letter from the Respondent advising it that the Respondent wanted to meet with the Union's bargaining committee at 1 p.m. on October 31. Accompanying this letter was also a letter from the Respondent to its employees calling a meeting of the employees at 2 p.m. on the same day (October 31) at Bud's Flower Shop (General Counsel's Exhibit No. 13) which read as follows:

The Company would like to discuss with the Union Bargaining Committee matters concerning the immediate future of the New Orleans Plant at 1:00 p.m., October 31, 1973 at the conference room at the plant.

Yours very truly,

/s/ DAW

D. A. Wells
Employee Relations Manager

With respect to the meeting held on October 31, 1973, Mr. Rousselle testified as follows:

A. Mr. Wells came into the meeting and said that the company had attempted to negotiate unsuccessfully, that the Union had not responded meaningfully to the Company's proposal of the 11th, that the Company had experienced operational difficulties in '69, '71, as a result the Company had made a decision to shut the plant down until the contract could be negotiated. The Company was not willing to let the people continue to work without a contract being in effect and the Company was going to, at two o'clock that afternoon make a similar presentation to the membership of the Union.

I responded to Mr. Wells' statement that the Company had tried in '69 to circumvent the Committee by going to the membership. I basically had no objections to any management personnel speaking to the members of that Local Union or any other Local that I personally represented.

I felt that the offer they made was inadequate and that if he wanted an opportunity to speak to our people and try to convince them they should accept such a settlement I had no objections to it.[2]

Mr. Wells credibly testified that he advised the committee on October 3, 1973 that the safety rules on the bulletin boards were torn down; and that the lock on one of the bulletin boards was broken and the safety rules removed. He also testified that on the evening of August 23, 1973, Mr. Weil called him and advised that the Respondent was experiencing an unusual number of paper breaks, and adjustments with the dryers and requested

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[2] I do not credit the latter testimony of Mr. Rousselle because I received the impression that he was not accurate and was exaggerating about what Mr. Wells said to the bargaining committee. Moreover, I believe and I credit Mr. Wells' testimonial version of what he said because it was written and he read it. Mr. Rousselle admitted Mr. Wells had a paper in front of him but he could not dispute that it was the remarks made by Mr. Wells (Respondent's Exhibit No. 5).

that he (Wells) contact the necessary union officials and see if something could be done to correct the situation. He thereupon called Mr. Rousselle that same evening and reported Mr. Weil's complaint to him and advised him that the Respondent was not going to continue to operate and make scrap; and that such conduct could only hurt negotiations if the activity continued. Mr. Rousselle said he had not seen Mack Jordan or Donald Hall for a few days but that he would check with them to see what the problem was and get back to him. Mr. Rousselle admitted at the hearing that he did not get back to Mr. Wells or the Respondent.

The parties met again on October 11 at which time he submitted an economic proposal to the Union for a 3-year contract, a proposal to give Respondent freedom to hire maintenance people from the outside; and proposal number 5 which was no lockout, no work stoppage language. He continued to testify as follows:

> A. With regard to Numbers 3 and 5, I emphasized, I spent some time on Number 3, explaining that this was an absolute must with regard to a settlement that the company was expanding its capital program that we needed more technical skills in the area of maintenance, that we didn't feel that the inhouse maintenance was of the caliber that could maintain this kind of equipment.
>
> I further stated that the vendors that was selling us this equipment did not have a provision that allowed for continuing maintenance on the equipment, thereby requiring that we assume complete responsibility for the maintenance of that equipment.

When he discussed company's proposal number 5 dealing with the language regarding interruptions to work, he advised that it would serve no useful purpose, that the Union had to act in good faith and get the people

back to work without work stoppage within 48 hours; that there would be no lockout and if there were a disagreement the same could be submitted to and decided by some other agency. The Union thereafter caucused until after lunch. Mr. Roussell then read from the Union's proposal but the parties did not reach any further agreement. The parties met again on October 12 and although the Union appeared to have made a proposal through the mediator which was relayed to the Respondent, the Respondent said that it was unacceptable.

Thereafter the parties reconvened on the same day and the Respondent through its plant manager, James Weil, read and submitted General Counsel's Exhibit 12 to the Union (Mr. Rousselle and Mr. Jordan); that Mr. Weil then stated that the parties had met in five sessions in an attempt to reach an agreement but have been unsuccessful; and that the Respondent presented a proposal which the Union rejected and that the parties had reached an impasse, to which statement Mr. Rousselle said "that is correct."[3] Thereafter, Mr. Rousselle responded by saying that he did not think there was anything illegal about the checkoffs which the Company had a right to deduct or not deduct, as well as not refer any disputes arising under the grievance procedure to arbitration. He did question the legality of the Union's security clause, which question he said he would turn over to the international's attorneys.

Mr. Wells further testified that he called Norman Gray, the production manager at Denver on October 13 and advised him of the disruption in production in the plant which had not terminated as a result of his talk with the union committee on October 3. Mr. Gray said

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[3] I credit Mr. Wells' undisputed testimony that Mr. Rousselle agreed that the parties were at an impasse and because the evidence of record supports the statement.

that he had also been advised by Mr. Weil about the disruptions and said that they (company officials) would have to keep an eye on the situation, which if it continued, a decision would be forthcoming. Mr. Wells thereafter talked to Mr. Gray on October 23 when the latter told him he was forced to shut down the plant once again as a result of the pits being filled up and numerous breaks in the machine paper during the beginning of the shift of the 22nd, and that it looked as though it was going to take several days to clean up. Mr. Gray said he would get back to him after talking to a Mr. Tappin, director of labor relations for the Respondent, and review the continued acts of sabotage in the plant.

On October 26 or the 27, Mr. Gray called Mr. Wells and said he was coming to New Orleans to speak to the members of the Local and that he had asked Jim Weil to put together some information over the years (1965 through the present time) of tons lost in production as a result of the acts of sabotage, as well as lost sales in dollars that occurred during negotiation periods.

Mr. Gray came to New Orleans on October 31 and met and talked with the members of the Local. Before Mr. Gray talked to the membership, Mr. Wells gave a talk (Respondent's Exhibit No. 5) to the union committee about 1 p.m., which was essentially the same as Mr. Gray's talk (General Counsel's Exhibit 14), the first part of which was as follows:

History shows the atmosphere of bargaining at this plant—

> The 1969 negotiations, including eleven meetings, resulted in eighteen days of lost production—some 2100 tons of felt and $1 million in sales. These losses were the result of irresponsible acts of machine upset.

> A direct attack on your job security.
>
> In 1971, more of the same. 2700 tons of felt & 23 days lost because of willful acts to disrupt production. These acts resulted in over $1.3 million in lost sales.
>
> These lost sales translate directly to lost facility and equipment investments at New Orleans.
>
> There is an understandable reluctance to spend additional capital to improve and expand a plant with an unstable and unrealistic labor climate. What about '73?
>
> As you know the contract expired October 12.
>
> No attempt was made to get agreement on a contract extension. The willful acts of '69 and '71 proved this would be meaningless.
>
> The door was left open—both with you gentlemen and the federal mediator for more bargaining.
>
> History repeated itself. Acts to disrupt production once again were perpetrated. Sheet breaks again filled the pits.

At the conclusion of Mr. Gray's remarks at the 2 o'clock meeting with the employees, Mr. Rousselle said to him, "You let us go before and we will go again. We can hold out to any amount of pressure you can give us. We will not settle for less than other plants." Sidney Meggs said, we don't care if you shut the plant down for 6 months. As Mr. Gray and Mr. Wells left the room he said that there was an outburst of shouting. He also stated that he sent the letter (General Counsel's Exhibit 15) to the homes of all employees by registered mail with a return receipt requested, outlining the decision and reasons for shutting down the plant and the discontinuation

of employee benefits. This letter was mailed prior to the October 31 meeting.[4]

C. *Correlation of Disruptions in Production With Periods of Collective-Bargaining History*

Mr. James Weil, the highly knowledgeable and experienced plant manager for the Respondent, testified that although the Respondent keeps records of its production and paper breaks, it does so for only 1 year and then discards such reports. He thereupon testified from his memory and reference to his personal diary in which he records statistics with respect to problems of production and machine downtime, so as to ascertain the causes of problems relating to production and nonproduction. In essence, Mr. Weil's testimony revealed that during the negotiation periods from November 16, 1964 to April 5, 1965 when a bargaining agreement was reached, that from September 1967 to late October 1969; that from September 1971 to November 1972 when a collective-bargaining agreement was reached; and that from September of 1973 until on or about October 23, 1973, the Respondent had experienced excessive paper breaks and machine downtime accounting for considerable losses in production.

He further testified that during the nonnegotiating intervening periods from April 5, 1965 to September 1973, paper breaks resumed their normal frequency rate of about three a week along, with a corresponding decrease in machine downtime. He further stated that on December 4, 1971 an air supply valve was shut off to the consistency regulator which determines the density of the slurry, and he brought this matter and the problem

[4] The testimonial versions of Mr. Rousselle, Mr. Wells and Mr. Weil, regarding the substances of the negotiation sessions are in pertinent parts, essentially free of conflict and are therefore credited.

of paper breaks to the attention of Mr. Rousselle and asked the union committee to intercede in trying to have the employees to stop the excessive number of paper breaks that were occurring. He also stated that in early October of 1973, the Respondent found that a 2,300 volt switch had been disconnected causing a shutdown of the mill. During this same period there were also some maladjustments in the dryer sections, as well as damage to a cylinder wire which appeared to have been clearly and sharply cut in the direction of going around the cylinder on October 2, 1973. The repair of that switch cost the Respondent $4,000. He said although he has had 35 years of experience in the paper industry he had never observed a damage of this type to a cylinder.

On October 2, 1973, Mr. Weil spoke with Mr. Mack Jordan, president of the local union, in the presence of Mr. Pete Spinnato, whereupon he asked him to intercede to see whether or not anything could be done about the individual employees causing lost time due to tampering with equipment; that Mr. Jordan replied that "We got a bunch of radicals down there and I can't do anything with them";[5] that he (Mr. Weil) went further and accused Mr. Jordan's group of taking cheap shots by tampering with equipment and causing lost time. These verbal exchanges resulted in an argument between himself and Mr. Jordan, who did not respond. He acknowledged that during the meeting of October 3, Mr. Rousselle advised him that he did not appreciate Respondent accusing his group of misconduct (tampering with equipment and production).

In early August one of the defibrators developed a vibration and unusual sound indicating that there was

[5] I credit Mr. Weil's testimony that Mr. Jordan made this statement but I do not construe such statement as an admission of knowledge of disruptive activities, or of the identity of employees engaged in such activities, or that Mr. Jordan approved of such activities.

some foreign material being ground into the discs. When the machine was shut down and opened, damaged ball bearings were located between the discs. On October 22, or 23, 1973 all three defibrators were inoperable because heavy foreign materials were lodged between the segments within the equipment; that on the following morning the defibrators were opened by the mechanics when foreign materials were discovered lodged between a rotating disc and some in the conveyors approaching the discs. By foreign materials he meant large pieces of scrap metal, bearings, odd and ends of metal and conveyor links. (All of which are described in Respondent's Exhibit Nos. 3 and 4) and it was observed by the Judge that some of the metal (¾ inch nuts) were distorted and mashed out of shape. Mr. Weil identified 13 such pieces of scrap metal. He further identified five additional pieces of metal. The pieces of conveyor links were identical to the conveyor links that were discarded on top of one of the buildings of the plant when they are no longer used to connect the conveyors. Also identified, were yellow railcar shocks used on the railcars in the plant. They weigh about 5 to 7 pounds and were found on the plate magnet at the base of the silo. The Respondent found junk metal in the bin at the end of the conveyor system. Respondent's Exhibit Nos. 3 and 4 are photographs of the scrap metal shown in the various machines and conveyor system. The photographs in Respondent's Exhibit Nos. 3 and 4 were taken on the morning of October 23 by Mr. Bill Cathcart, the production superintendent for the Respondent, and according to Mr. Weil, represented what he observed in the machinery on October 22 or 23.

On October 22, 1973, Mr. Weil said there were a series of paper breaks resulting in the production of only 13-½ tons of paper as compared to a normal days' production of 110 to 120 rolls. He also identified photographs on Respondent's Exhibit No. 3 showing the pits under the

machine filled with scrap paper. He also testified that if certain previously identified large pieces of scrap metal had reached the grinding discs of the conveyors, there would have been complete damage to the machine, complete disintegration, and possibly rupture to the external portion of the machine (the housing). If such scrap metal penetrated the housing, the result would or could have been an explosion possibly causing fire as he had once observed such an explosion of a defibrator. After discovering all of the scrap metal in the machines and conveyors on October 23, Mr. Weil said operation of the plant was shut down and production workers were laid off. Some maintenance people were kept in the plant to clean up the scrap from the pits and to open up the defibrators to repair them and check out other equipment. Two weeks prior to October 22 there was a layoff of production workers.

Plant Manager Weil further testified about normal periodic machine downtime prior and subsequent to October 1973. However, he went on to explain that the metal parts which got into the machinery during these times were smaller metal objects, which did not cause great damage and was not widespread in occurrence. For example, he said there is nothing unusual about replacing the discs, but the problems presented on October 23, 1973 were due to the size of the metal items which also presented the probability of a hazardous explosion. He admitted that he did not know how any of the scrap metal items brought into the hearing room got into the production system. While the Company takes reports about downtime on machine operations, he said such reports do not come to him and the Respondent discards such reports in January or February of each year. Although Respondent was having some problems with its conveyors in the earlier part of 1973, he said it was not having such problems in October of 1973.

Counsel for the General Counsel's rebuttal witness, Ray Owen Stage, testified that from the position of some pieces of the scrap metal in the machinery, it appeared that they had been placed on the hot screw; that disc jams are not unusual and that he did not believe that some of the scrap metal had worked its way through the small openings in the machine process or that such scrap metal could cause an explosion. On cross-examination, however, it was well-established that Mr. Stage did not even work on or around the machinery in question and he could not give any estimate nor was he in the position to estimate the number of paper breaks or downtime of the machinery, or explain how such metal parts got into the machinery.[6]

Rebuttal witness Angelo John St. Angelo's testimony about the usualness of frequency or metal objects jamming the discs was conflicting. He stated that it was not unusual to replace discs about every 3 weeks; that the normal life of a disc without the injections of foreign material is about 3-½ weeks. He admitted, however that the amount of paper in the pits on October 23 was unusual and that he had never seen such large pieces of metal in the machines as are shown in Respondent's Exhibits 3 and 4.

General Counsel's rebuttal witness Donald R. Hall further testified that he was the shift utility man and had responsibility for cleaning out both machines over the

[6] I do not credit witness Stage's testimony because it was obvious that he did not have knowledge of nor was he in a position to have knowledge of any statistical data with respect to production, paper breaks or downtime of the machinery (pressers, conveyors or the defibrators). Moreover, the Respondent did not assert that the scrap metal worked its way through the conveying parts. On cross-examination it became obvious that this witness either did not know what he was talking about or that he was being untruthful in his answers as is partly reflected on the record. His testimony was evasive, selective, and he manifested an inability to recall where and when he worked in the plant.

pit and threading the machines, washing the brammers, cutting the tail for the threading of the machines and relieving people on the machines. He has been a utility man for 5 years and estimates that there were 7 to 14 paper breaks per week on number 1 machine, and 9 to 14 breaks on number 2 machine. With respect to the amount of paper in the pits, Mr. Hall stated that paper proceeded to accumulate excessively in the pits around January of 1973. He said that the machines are seldom shut down to clean out the pits because they have a crew to clean out the pits; that paper was accumulating at such a rate until the policy was changed and it was left up to supervisors to determine when to clean out the pits. The witness later changed his testimony to say that from his experience paper breaks averaged about 7 to 14 breaks per shift, instead of per week, during the period January 1973 through August 1973. He said the average remained the same through October of 1973. He also admitted that there were as many as six breaks in 1 hour on one machine in October of 1973, when they had paper breaks one after another. Specifically, on October 22, 1973, he said there was an unusual number of breaks on a single shift. The witness further clarified his answer to say that that was not an unusual number for one shift, but it was for a period of 1 hour and a half. The witness then said he meant 7 to 14 paper breaks per day.[7]

Counsel for the respective parties stipulated that Mr. Tate, an experienced machine tender since 1969, said there were six to seven breaks per week during the period January 1 through August 1, 1973, and that Respondent had experienced an unusual number of breaks in May and July; that Mr. Haisch said that there had been six

[7] I do not credit the testimony of this witness whose testimony is obviously conflicting, uncertain and confusing. Moreover, I received the impression that the witness was being selective in answering certain questions propounded by counsel for the respective parties.

to seven breaks per shift during the same period; and Mr. Key said, on the number 1 machine they would have an average somewhere between 9 and 10 breaks on his shift. Mr. Haisch has had different experiences with the number 2 machine (12 to 13 paper breaks per week).[8]

D. *Respondent Shuts Down Plant*

The Respondent (Mr. Gray) met with the employees at Bud's Flower Room at 2 p.m., on October 31 where about 100 employees were in attendance and at which time he read the prepared statement comprised in General Counsel's Exhibit No. 14, which in essence told about the efforts of the Respondent and the Union to achieve an agreement. However the statement went on to state as follows:

> Your representatives gave little or no consideration of the proposals made by the Company.
>
> On October 12, the Company presented a complete offer to your representatives. It was rejected without a realistic counterproposal and the contract expired. Your representatives have demonstrated an irresponsibility toward the plant and the membership.

[8] While I do not discredit the estimates of paper breaks given by rebuttal witnesses Tate, Haisch and Key, I do not give as much weight to the accuracy of their statistics as I do to the accuracy of the statistics of paper breaks given by Plant Manager Weil, because, not only was I impressed that Mr. Weil was also testifying truthfully, but his statistics were supported by other statistical data relating to quantum of production and machine downtime, which factors appeared to be relevant factors with which management reasonably would be concerned. Moreover, Mr. Weil's recollection of estimates of paper breaks was aided by notes in his personal diary to which he referred, while the employee witnesses were estimating from their own individual experience point of view, I further attribute more weight to Mr. Weil's statistics because said statistics are consistent with the other evidence of disruptions of production in the plant during the 1973 negotiation period, the credence of which appears to be supported by a past pattern of disruption during previous renegotiating periods.

> An unrealistic 1-year settlement demand and failure to provide meaningful counter offers typifies this irresponsibility.
>
> This irresponsibility toward your job, your family's security, and your place of employment is your business. However, the future of this plant, the safety of the work force, and the preservation of company assets is the responsibility of the Company. We will not be irresponsible. Mr. Wells continued to read, pointing out the number of days spent in negotiations resulting in loss of production to the Respondent in 1969 to the tune of one million dollars, similar losses in 1971 during the negotiation period and further pointed out that the willful acts of 1969 and 1971 proved that no attempt was made to get an agreement or contract extension; and that at the present time acts of disruption once again were perpetrated as follows:
>
> . . . SHEET BREAKS AGAIN FILLED THE PITS.
>
> THE LAST ACT OF IRRESPONSIBILITY OCCURRED AT START-UP ON OCTOBER 22.
>
> STEEL BALL BEARINGS, SCRAP METAL, AND RAILROAD WHEEL CHOCKS WERE WILLFULLY AND WANTONLY PUT INTO THE WOOD CHIP BINS.
>
> THIS FOREIGN METAL WAS FORTUNATELY DETECTED BEFORE IT TOTALLY DESTROYED THE DEFIBRATORS. IT DID, HOWEVER, DO SIGNIFICANT DAMAGE.
>
> THE SERIOUSNESS OF SUCH AN ACT CANNOT BE OVERSTRESSED. IT SHOULD BE ABSOLUTELY CRYSTAL CLEAR THAT THESE DISRUPTIONS ARE ABOVE AND BEYOND COINCIDENCE.

THE LOSS OF THE THREE WOOD DEFIBRATORS WOULD SHUT DOWN THE PLANT FOR SIX TO EIGHT MONTHS. THE TOTAL COST FOR REPAIR WOULD RUN 1/2-MILLION DOLLARS.

WITHOUT THIS KEY OPERATING EQUIPMENT ON LINE, A LABOR AGREEMENT WOULD BE UNNECESSARY.

IF THE METAL HAD NOT BEEN DETECTED, THE EQUIPMENT COULD HAVE TORN ITSELF APART WITH CONSIDERABLE RISK TO THE SAFETY OF EMPLOYEES IN THE AREA.

THERE IS AN OBVIOUS DISREGARD AND DISINTEREST IN THE SAFETY OF FELLOW EMPLOYEES, IN THE FUTURE OF THE PLANT, AND THE JOB SECURITY IT HAS MEANT.

THESE WILLFUL AND DISRUPTIVE ACTS HAVE REPEATEDLY BEEN BROUGHT TO THE ATTENTION OF YOUR REPRESENTATIVES. THE SERIOUSNESS AND CONSEQUENCES HAVE BEEN EXPLAINED. THEY ARE UNWILLING TO TAKE THE CORRECTIVE ACTION NECESSARY TO PROTECT YOUR SAFETY OR JOB SECURITY.

THE COMPANY IS UNWILLING TO CONTINUE TAKING THESE RISKS.

THEREFORE, UNTIL SUCH TIME AS A NEW LABOR AGREEMENT IS REACHED, THE PLANT WILL REMAIN CLOSED.

WE ARE WILLING, HAVE BEEN WILLING, AND SHALL REMAIN WILLING TO SIT AT THE TABLE FOR MEANINGFUL NEGOTIATIONS. THE CLIMATE OF DUAL COMPROMISE

LEADING TO A SETTLEMENT HAS NOT BEEN DEMONSTRATED BY YOUR REPRESENTATIVES.

WE MUST, THEREFORE, TAKE ACTION TO PROTECT COMPANY ASSETS AND FOREGO THE FELT PRODUCTION NEEDED FROM THIS PLANT.

IN ADDITION TO CLOSING THE PLANT, IT IS OUR ATTENTION TO SUSPEND ALL COMPANY-PAID BENEFITS EFFECTIVE TODAY, OCTOBER 31, 1973.

TO PROTECT YOUR FAMILY FROM ECONOMIC HARDSHIP CAUSED BY ILLNESS, IT IS RECOMMENDED THAT YOU TAKE IMMEDIATE STEPS TO OBTAIN HOSPITALIZATION AND MEDICAL INSURANCE ON YOUR OWN.

I WILL REPEAT, WE ARE READY TO MEET AND BARGAIN. HOWEVER, YOUR REPRESENTATIVES HAVE BEEN UNAVAILABLE.[9]

THE PROJECTED FUTURE OF NEW ORLEANS PLANT IS AT STAKE. I EARNESTLY HOPE THAT NEGOTIATIONS CAN RESUME IMMEDIATELY.

After Mr. Gray completed the above-quoted speech to the employees he immediately walked out of the room and Mr. Rousselle testified that he approached Mr. Wells and asked him to have Mr. Gray come back and tell the employees the truth; that the employees were available for negotiations but that Mr. Wells refused to do so. Nevertheless, the Union was always available to meet with the Respondent and it never requested a postponement or a delay in such meetings.

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[9] I do not credit Mr. Gray's statement that union representatives were not available for negotiations because it is not only denied by the Union but is also unsupported by the evidence of record.

E. *Post Shutdown Collective Bargaining and Permanent Replacement of Employees*

After the plant was shut down, about 85 or 86 employees filed for unemployment compensation which the Respondent unsuccessfully contested. On November 7, 1973, Mr. Rousselle called Respondent's Denver, Colorado office to speak with Mr. Chuck Hite, the former employer-relations manager for Respondent, and was referred to Mr. Hite in Columbus, Georgia. He asked Mr. Hite was he aware of what was going on at the felt mill plant in New Orleans and Mr. Hite said he did not know what he was talking about, so he advised Mr. Hite that the Respondent was trying to avoid meeting with the Union's bargaining committee, and at the same time was accusing the Union of being irresponsible and refusing to meet with it. After checking into the situation, Mr. Hite returned Mr. Rousselle's call several days later and he advised him that he was coming to the New Orleans bargaining meeting and would have a proposal which he felt that the Union could not refuse.

The parties met on November 14, 1973 and the Respondent was represented by Mr. Hite and Mr. Weil with Mr. Rousselle and the members of the union committee. Mr. Hite of the Respondent opened the meeting by distributing a proposal (General Counsel's Exhibit 18) which provided for a 3-year contract, a wage increase for the first year, previously granted benefits and a no-strike, no-work stoppage, no slowdown, and no lockout provision, a provision for filling vacancies among other things, except a provision regarding its right to employ electricians or other specialized employees off the street. The Union (Mr. Rousselle) made a counterproposal which Mr. Rousselle testified was as follows:

> A. We made a counterproposal to the Company and I prefaced my remarks by saying that the Union was not interested in a three-year agreement.

> We had had two-year agreements previous to this but in order to try to resolve the issue we would make a proposition based on a three-year agreement, and, that proposition would be a three-year contract with 30 cents an hour wage effective the first year, 30 cents the second year, 30 cents the third year; increase the pension plan by one dollar times years of service for each year of service prior to 1966 and after subsequent to 66, reduce the waiting period of accidents period from a seven day waiting period to a four day waiting period, increase the shift premium one cents per hour on each of the two shifts, 3 to 11 shift and 7 to 11 shift; and, the company would withdraw its proposition on the maintenance proposal that they had, and, the no strike, no lock out provision that they had amended revert back to the original contractual language.

Mr. Hite then said that that was the best the Company could do because it had no more money to offer and that it was it. The parties left without agreeing on a future meeting date. However, the parties met again on November 27, 1973, at which time they again discussed the matter of seniority and training employees but they did not reach an agreement. At the conclusion of this meeting however, the principal remaining issues dividing the parties were wages, the maintenance of training issues and the no-strike language. The parties met again on November 30, 1973 with Mr. Bates, the federal mediator, and both parties advised that they had no further moves to make. The record indicates that the parties also met in January.

Michael A. Tappin, vice president of Respondent and director of labor relations, credibly testified that on November 8, 1973 he met with Edward or Edgard Switcher

of the union headquarters in Denver, Colorado when he asked Mr. Switcher his views on the New Orleans strike situation. After a brief discussion of the situation both Mr. Switcher and Mr. Tappin agreed to take a look at their respective views to see what they could do. As a result of this meeting Mr. Tappin had a new economic proposal prepared (General Counsel's Exhibit 18). On March 20, 1974 Mr. Tappin along with other company officials met with Mr. Grospiron, president of the Union and Mr. Rousselle in an effort to resolve the New Orleans dispute. The parties did not reach any agreement.

William H. Gates, vice president of the Respondent and production operations manager for the residential products division of the Respondent, credibly testified about his familiarity with the labor dispute at the Respondent. He stated that on October 10, 1973 Respondent was becoming increasingly concerned about the reported incidents of sabotage and decided that if such activity continued it would have to shut down operations of the plant, because it was clear the operation could not sustain itself. Consequently, he and Mr. Gray decided more or less to shut down the plant on October 12, 1973. Between October 12 and October 20, they decided to try one more time by opening the plant and calling the employees back to work. Operations were resumed on October 21. However, due to reports subsequent thereto that metallic objects were being found in the defibrators, he and Mr. Gray decided very quickly that the operation could not sustain itself because it endangered not only property of the plant but lives of its own personnel and people in the area.

In the production reports for the month of February 1974, Mr. Gates said he noticed that production was substantially lower (1143 tons as compared with 3234 tons) than he was accustomed to receiving from the Respondent plant. (Respondent's Exhibit No. 8). He also noticed the cost per ton was exceedingly high ($161.44 as compared to $80 to $90) than was the customary cost. The report also showed that the Respondent plant made a 35 percent unfavorable variation and purchase of materials for that month. And the report also showed that salaries were low because some 20 production employees were brought in from other plants and were on the payrolls of the other plants. The total picture revealed by this report was one of underproduction and unusual expenses of trying to keep the plant in operation. All of these figures showing losses in production and expense were arrived at by comparing production and costs during the same period, February of 1973.

As late as November 1974 the Respondent's officials were concerned with the tremendous loss in production from the New Orleans Respondent plant. Mr. Gates corroborated the testimony of Mr. Tappin with respect to the conversation they held on March 20 about the meeting Mr. Tappin had with Mr. Grospiron and his statement that Respondent might have to go ahead and hire permanent economic replacements. Mr. Gates verified the production estimated reports for January (February 1973) with which the February 1974 production reports were compared.

Mr. Gates' estimate of loss and pretax profits to the Respondent during the period November 1, 1974 through March 30, 1974 as compared with the same period during the previous year amounted to 1.5 million dollars, as a result of the labor management difficulties. The loss in production at the New Orleans plant affected the production operation and work hours at the Savannah plant from November 1973 through May of 1974. Also affected by the labor difficulties of the Respondent were its plants at Marrero in terms of layoff of 30 to 40 employees during the subject period. Mr. Gates admitted that Respondent did not communicate its intentions to the Union to permanently replace the employees of the New Orleans facility.

Mr. Welles attended a meeting at the Respondent's headquarters in Denver, Colorado office on March 21, 1974, during which time Mr. Gray said it appeared there wasn't going to be a settlement at the New Orleans felt mill based upon the information he had at the meeting on the preceding day at the Union's international headquarters with Mr. Rousselle, Mr. Weil, and Mr. Tappin. He then asked Mr. Tappin about permanent replacements and picked up the telephone and spoke with legal counsel, Mr. O'Brien. While on the phone, he asked Mr. Wells how long it would take to replace the work force. After he hung up the telephone he said let's go ahead and hire permanent replacements and they agreed to start hiring the first part of April 1974. Thereupon Mr. Wells commenced interviewing applicants around the first week in April and seven new employees came on the payroll April 8, 1974 until they reached 120 employees, although there are only 100 employees at the present time. The employees were told that as insofar as the Respondent was concerned they were permanent employees.

Mr. Rousselle remained in communications with the mediator who suggested a meeting with the company which was held on April 16 and/or 18, 1974, when both parties maintained their respective bargaining positions.

Many of the temporary employees were borrowed or furnished by Babst Services and those who became permanent employees severed their relationship with that Company. Respondent stopped using the services of Babst on April 29, 1974. The temporary employees were on the payroll of Babst Services during the time they were working in Respondent's plant.

The next meeting took place upon the Union's request (through the mediator) on June 12, 1974, at which time the Union proposed that for every mechanic Respondent was allowed to hire from the outside, that it would also be obligated to put in a bid for one inside employee who

agreed to enter a training program while remaining employed. The Union asked the Company what was the approximate number of trained persons they wanted to hire off the street, and Mr. Wells said about seven people, but that the Company's November 14 offer was still the Company's offer. He also said the Respondent had not received any written or oral request from the Union to bargain thereafter.

Marion A. Cooper credibly testified that he had been employed at the plant since 1942 and was there when the Respondent bought the plant in 1965; that at first he was a machine tender and later went to the maintenance department. He further stated that in October and the summer months of 1974, he and a Mr. Springer were by the receiving gate to establish the picket line when Mr. Spinnato walked up and asked them how were they doing, and they responded fine. The following conversation ensued:

> A. He asked us how you boys doing. I said, we doing fine. He said, when you all coming back to work. We told him we said, well, it is up to the Company. He said, well, he says, if you can get your Negotiating Committee to accept the offer that the Company made, he said, you all would go back to work tomorrow.
>
> Q. Did you respond to this?
>
> A. Well, truthfully I didn't have time to respond because just about that time they paged him on the PA System.

Mr. Cooper last worked for the Respondent on October 31, 1973.

Willie John Tate credibly testified that he has worked for the Respondent since 1946; that he was not working on October 31, 1973 and did not have a conversation with

the Respondent until about May or September 1974, when he had a telephone conversation with Mr. Spinnato who asked him how he was doing and he told him he was doing "bad." He then asked him if he wanted to get together and come to work and he responded that they could not get together because he (Tate) could not get the employees together; that Mr. Spinnato then said well if I furnish you with a list of the names of employees would you call the guys and see if you can get them to come back to work and Tate said he would. Mr. Spinnato did give Tate a list with 26 names and telephone numbers, including his own, and the latter called all of said employees and only one declined to return to work. The following day he said he called Mr. Spinnato and told him that all except one agreed to come back to work until the contract is settled providing the rest of them would be able to return to work. However, he said he did not hear any further word from Mr. Spinnato. This conversation occurred after the picketing had started. All of the 26 persons were either maintenance men or bag tenders or machine tenders. And the union committee members or officers were maintenance employees. None of 26 persons called by Mr. Tate were members of the Union's negotiating committee.

Robert Key credibly testified that he worked for the Respondent since June 1967 and was working until October 31, 1973 as a machine tender, bag tender, roll man, utility man, acting supervisor; that in or about June 1973 while in the Felt Mill plant's office he overheard Mr. Weil, Henry Eike, and Henry Barcia when he overheard Henry Eike say he couldn't wait until the expiration date of the contract when he could see a change in the maintenance department; and Mr. Weil said that he felt sorry for the boys in the maintenance department. Mr. Barcia said: "there's some damn good people over there. I hope that I'm not jeopardizing his job."

This conversation took place 4 months before negotiations with Mr. Eike, he thinks Mr. Eike had responsibility for the maintenance employees.

Angelo John St. Angelo testified that he started work with Flintkote Company in the mechanical department in 1940 and has remained with the Company even after it was taken over by Johns-Manville and is now head mechanic of the maintenance department; that his first contact with Respondent since October 31, 1973, was in June 1974, while picketing at the gate, when Mr. Henry Eike came out and said he would like to have all of his old mechanics back; that when he (St. Angelo) said you can have us back, you locked us out and all you have to do is call us back and we will be back; that Mr. Eike then said we just can't do that and when St. Angelo asked why not, he said Mr. Eike said not unless you accept the contract that Johns-Manville offered you. Mr. Eike was St. Angelo's supervisor prior to October 31, 1973. His next contact with the Respondent was about December 2, 1974, while leaving the Flintkote personnel office after applying for a job. Mr. Spinnato asked him why didn't he come to work at the plant and he replied that he was ready to come back to work; that Mr. Spinnato then said all you have to do is accept the contract that the Company offers you, and St. Angelo said he simply walked away.[10]

Analysis and Conclusion

A careful review of the credible evidences of record summarized under topics B and C *supra*, clearly establishes that the parties herein (Respondent and the Union) were engaged in collective-bargaining sessions from September 11, 1973 through and up to June 13, 1974. Per-

[10] I credit the undisputed testimonial accounts of witnesses Tate, Key and St. Angelo with respect to the conversations company officials had with them about returning to work at the plant.

haps the bargaining of the parties might properly be described as hard bargaining. Noteworthy in any event, however, is the absence of any allegation or clear and credible evidence that either party had refused to bargain or has engaged in bad faith or surface bargaining during the period of September 11, 1973 to April 8, 1974 (the date on which Respondent first hired permanent replacements for its locked out unit employees). Hence, at least during this particular period, an issue of good faith bargaining is not presented for decision momentarily. The evidence is also clear that in spite of several bargaining sessions the parties were unable to reach a new collective-bargaining agreement, although its current agreement was to expire on October 12, 1973 and that bargaining had reached an impasse.

Concurrent with the bargaining sessions during September and early October 1973, was the occurrence of a series of plant disruptions in production as a result of increases in paper breaks, the insertion of large and small pieces of scrapmetal into the production machinery, which posed an added possible risk of future damage or destruction of such machinery, and/or the possible injury to life or limb of plant personnel or persons in the proximate vicinity. The Respondent produced evidence that it sustained substantial losses in production, $4,000 expense to repair a piece of production equipment, and substantial losses in profits as a result of operational disruptions during the subject period. The Respondent apprised the bargaining committeeman Mack Jordan on October 2, and Union representative, Rousselle and his bargaining committee on October 3, 1973, about the disruptions in the plant and requested the Union's assistance to have the unit employees end the destructive activities. While both officials expressed their denial and resentment about the complaint, representative Rousselle ultimately promised he would check into the matter and get back to the Respondent. However, the Union (Mr. Rousselle) made no

further response to the Respondent about such activities. Respondent not only apprised the Union of the disruptive activities but also of the financial consequences it was sustaining as a result thereof.

When the parties did not agree upon a collective-bargaining agreement at the last bargaining session on October 12, 1973, the Respondent announced the expiration of the current bargaining contract at midnight on that date and further emphasized that it would not thereafter honor any of the terms of the expired contract. It might very well be that the Respondent's emphatic renunciation of continuing the terms of the expired contract on the very date of its expiration, when considered along with its layoff of some production employees prior to October 12 and others subsequent thereto, reasonably infers that the Respondent decided to exert pressure on the employees, coupled with the eventual shutdown of the plant in order to break the bargaining impasse. In any event, since the collective bargaining of the parties was at an impasse on October 12, 1973, the Respondent could legally shutdown its plant without violating the Act, if it did so, as I find, since the shutdown or lockout did not have a discriminatory or restraining effect upon union membership, the exercise of employees' protected rights, and because it was done for a legitimate and substantial business purpose without antiunion motivation. This conclusion is in accordance with *American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300 (1965), where the Court said: "Accordingly, we hold that an employer violates neither Section 8(a)(1) nor 8(a)(3) when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position."

On October 22, 1973, when the Respondent experienced an excessive number of paper breaks which resulted in

the filling of the pits under the machines, and its discovery of an unusual number of large and small pieces of scrap metal in its conveyors, bins and defibrators on or about October 23, which resulted in substantial reduction in production, some damage and the risk of more substantial damage to its machinery, and the possible risk of loss of life or injury to persons within the vicinity, the Respondent stated, and I so find, that it also decided upon these additional factors without antiunion motivation, to lay off the remainder of its production employees, immediately, and thereafter close down the plant on October 31, 1973. Such a shutdown of the plant and lockout of its employees under the circumstances, may be legally justified where the object of the Employer is to serve a legitimate business purpose without antiunion motivation. See *International Shoe Company*, 93 NLRB 907 (1951), where the Board said, "Nothing in the Act, in our opinion, requires that an employer continue to operate his plant despite the prospect of recurrent work stoppage which would make further operations uneconomical."

Although the Respondent introduced evidence showing it experienced some disruptions in production during previous negotiating periods, such evidence does not show that any disruptions experienced during those times were made an issue in the bargaining sessions or that they were clearly and formally brought to the attention of Respondent's employees. Only on one such occasion did the Respondent complain to the Union about paper breaks during a prior negotiating period. While I do not discredit Respondent's testimony about such disruptions during past negotiation periods, I nevertheless do not attribute much weight to said *testimony*, because Respondent did not establish that such activities during those periods were any better established to have constituted concerted activity on the part of identified employees than it does for the activities during the present 1973 bargaining session.

Consequently, based upon the foregoing credible evidence, legal authority, and reasons, while I conclude and find such evidence sufficient to legally justify the Respondent's lockout of its employees to impose economic pressure upon them in an effort to advance its bargaining position, on the one hand, and to protect its legitimate and substantial business operations from frequent disruptive operations on the other, I nevertheless do not find such evidence sufficient to support a conclusion and finding that Respondent's employees were engaged in an in-plant "strike," so as to enable it to replace or discharge its entire complement of production employees. Additionally, I also find such evidence insufficient to support a conclusion and finding that Respondent's employees were engaged in concerted improper conduct, so as to legally justify its replacement or discharge of its entire complement of unit production employees.

In view of the fact that such disruptive acts could have been performed by any one employee, acting independently and not on behalf of any other employee or the Union; that the evidence of record fails to show that Respondent conducted any in-plant investigation in an effort to ascertain who was responsible for such disruptive activities; that the Respondent did not introduce any evidence which identified any employee who was even alleged to be responsible for such activities, I am thereby persuaded that the Respondent did not have reasonable and sufficient objective considerations upon which to conclude that any or all of its employees were engaged in improper and unlawful conduct or concerted activity, so as to justify its replacement or discharge of all of its production employees, innocent or guilty alike.

The Respondent contends that the evidence shows concerted interference with Respondent's production and its means of production by its production employees, which interference constituted an illegal, in-plant strike to force

Respondent to accept the Union's bargaining demands. However, while a cursory review of the evidence might circumstantially infer such a concerted effort on the part of the production employees, I find that a comprehensive examination of the evidence tends to render such inference highly speculative when certain factors thereof are taken into consideration. In this regard, it is noted that it is well established by the undisputed evidence that: Paper breaks are caused by several unintentional factors as well as by intentional acts; that the frequency of such paper breaks, though somewhat stabilized during nonnegotiating periods, was nevertheless erratically unstable on some occasions during the same period; that anyone, or a combination of employees, can intentionally or unintentionally cause paper breaks by improperly adjusting the heat or revolutions of the dryer machines, by varying the paper mixture formula, or by striking the paper with the hand or an object; and that since Manager Weil's testimony on the frequency of paper breaks was not from official company records, and additionally, was in conflict with the testimony of some of the employees who operated the machines daily, I find the frequency rate of paper breaks during the nonnegotiating periods was about eight (8) per week, instead of three (3) per week as Respondent contends, or considerably more per week as the employee witnesses contend. This figure makes allowance for inaccuracies and bias on the part of witnesses for both parties.

With respect to the occurrence of some increase in paper breaks, the presence of scrap metal in the production machinery, along with evidence of other acts of disruption in production during September and October 1973, it immediately appears logical that the circumstantial evidence of such acts infers that they were carried out by Respondent's production employees. However, when it is further considered that such evidence fails to iden-

tify a single or any group of employees, or to establish that the Union and/or any plant employee, independently or through a conspiracy, actually engaged in sabotage or such disruptive activities, the inference that they did so, become less significant in its probative value than it initially appeared. This evaluation is particularly true when it is observed that such activities could have been carried out by a single individual, acting on his own behalf and not on behalf of, or in concert with, other employees or the Union. Moreover, the evidence fails to show that the Union either advocated, initiated or condoned the disruptive activities, as compared with the Union's suggested work slowdown in *Raleigh Water Heater Manufacturing, Co., Inc.*, 136 NLRB 76 (1962), cited by counsel for the Respondent. There, unlike here, the employees who participated in the work slowdown on the suggestion of the Union were identified and their participation therein unquestionably in concert.

On the contrary, the Union in the instant case emphatically denied that its unit employees were engaged in disruptive activities in the plant even though it failed, for some unexplained reason, to report to Respondent whether it investigated its members involvement as it had promised Respondent it would. Perhaps it was unable to identify any employees involved or it might have been continuing an investigation. Finally, none of the employees herein are identified as having engaged in the disruptive activities and none of the activities herein were established to have constituted concerted activity on the part of the unit production employees. Also not controlling in the instant proceeding is the case of *Massey Gin and Machine Works, Inc.*, 78 NLRB 189, cited by counsel for the Respondent, for the same reason that the evidence therein established the identity and concerted walkout of the employees. Likewise, in *N.L.R.B.* v. *Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939),

also cited by counsel for the Respondent, it was abundantly established by the evidence that certain identified employees occupied the company buildings and refused to leave, even in the face of a State Court injunction. Here again, there was no question as to the identity of the employees or the concerted nature of their sit-down in-plant strike activity, which activity I find conspicuously absent in the instant preceeding.

Post Lockout Bargaining and the Use of Temporary Replacements

The evidence clearly shows that the Respondent met in negotiating sessions on November 11 and again on November 14, 1973, and that during the latter session Respondent proposed among other things, a 3-year contract, a wage increase for the first year, previously granted benefits and a no-strike, no-work stoppage, no-slowdown, and no-lockout provision. The Union responded with a counterproposal which among other things included a request to Respondent to withdraw its proposal on the hiring of maintenance employees and the no-strike, no-lockout provision. Respondent refused the request and other counterproposals. The parties thereafter met in conference or bargaining sessions on November 8, 27, and 30, 1973 and in January and March 20, 1974, without reaching an agreement. On March 21, 1974, Mr. Wells met with company officials during which time Respondent, either seriously or tactically, decided to hire permanent replacements for the locked out unit employees. On April 8, 1974 Mr. Wells hired the first seven permanent replacements until there were 120 replacements hired. At the time of the hearing there were 100 permanent replacements on Respondent's work force.

The parties nevertheless met again in bargaining sessions on April 16 and 18, 1974 without reaching an

agreement. Both parties agreed that the Union did not commence to picket at the plant until about April 29, 1974. The parties met in negotiation session on June 12, 1974, at which time Respondent advised the Union that its offer was the same as that submitted to the committee on November 14, 1973. There was some testimony by employees Tate, Key, and St. Angelo, that between May and October 1974, company officials held conversations with each of them about returning to work or getting other employees to return to work. However, neither conversation shows that Respondent made an unconditional offer to any of the employees to return to work or that such an offer was ever extended to unit production employees.

Counsel for Respondent contends that Respondent's November 14 offer to reopen the plant upon the condition that the employees agreed to sign the contract as it proposed, is similar to the employer's offer to employees in the *Raleigh* case, heretofore cited. However, my reading of the *Raleigh* case does not convey such similarity. In the instant case Respondent's offer to the bargaining committee contained not only a no-strike, no-stoppage, no-slowdown provision, but also its economic proposals which the Union had previously rejected. In the *Raleigh* case the employer first warned the Union that if the work slowdown did not cease it would lay off the employees. When the slowdown did not cease, the employer laid off the employees but thereafter sent each employee a letter advising them that they could return to work on a certain day if they were not going to participate in a slowdown; and that if they did not return by said date they would be permanently replaced.

Unlike the employer in Raleigh, the Respondent did not warn the employees directly or through the Union that if the disruptions did not cease, all unit production employees would be laid off and the plant closed. Nor

did Respondent request such an independent assurance from the Union or directly from the employees after the plant's closure, that if the disruptions would cease it would reopen the plant. Instead, Respondent's offer to reopen the plant was based upon the unit employees' acceptance of Respondent's economic proposals along with the no-strike, no-slowdown request. Consequently, the Union could not exercise its right to reject (bargain freely) Respondent's offer without rejecting its request for a no-strike, no-slowdown provision in such a joint offer. Moreover, since the offer or proposal was joint, the Union's rejection of the no-strike, no-slowdown portion could not convert the locked out unit employees into economic strikers.

I find nothing in the record to support Respondent's contention that efforts by it to seek assurance from the employees against further disruptions after the plant closure would have been futile. While Respondent's joint offer was legal as containing an additional bargaining leverage, its rejection by the unit employees could not convert them into economic strikers so as to justify their permanent replacement or discharge. In other words, the employees here, as distinguished from the employees in *International Shoe Company*, elected not to sign the contract as did the employees in *International Shoe Company*. If they had, the added leverage of the Respondent's bargaining no-slowdown weapon would have been successful and Respondent would not have been guilty of conduct violative of the Act.

Since the lockout (defensive and offensive) herein was legally justifiable, the Respondent could reopen and continue to operate its plant as it did with the use of temporary replacements during the bargaining impasse. Such operation is legally permissable because I find the evidence of its impact upon the exercise of the employees' protected rights to be slight, as compared to the em-

ployer's legitimate use of the lockout and continued operation with temporary replacements. *Inter Collegiate Press*, 199 NLRB 177 (1972). At this juncture, the employees were left with the alternative to accept the Respondent's proposed contract or holdout for continued bargaining, as they elected to do. The Respondent was left with the alternative of making some concessions in it bargaining demands or continue to endure any inefficiencies and losses in profits it was experiencing with hopes of breaking the bargaining impasse. At least, in a theoretical sense, the parties were on relatively equal footing and neither were engaged in conduct violative of the Act.

Unilateral Permanent Replacement of Locked Out Unit Employees

However, the evidence shows that on March 21, 1974 the Respondent commenced losing its fortitude in the holdout when it started discussing the permanent replacement of its locked out unit employees without consulting or notifying the Union or the employees of such intention. Consequently, when Respondent unilaterally commenced hiring permanent replacements of its unit employees on April 8, 1974, without consulting or notifying the Union or the employees, I find such action did in fact tilt the scales out of balance with respect to bargaining power; and that such action also rendered more than a slight adverse effect upon the employees' protected rights, as compared with Respondent's legitimate business purpose and its lockout bargaining leverage. In fact I further find that Respondent's permanent replacement of its entire complement of unit employees was so inherently discriminatory and destructive of said employees' protected rights; that such action constituted a per se violation of Section 8(a)(3) and (1) of the Act, as the Court held in *Erie Registor Corp.* v. *N.L.R.B.*, 373 U.S. 221 (1963); and that such finding is also in

accordance with the principle enunciated by the Board in *Inter Collegiate Press*, heretofore cited.[11]

Finally, I also conclude and find that Respondent's permanent replacement of its entire complement of unit employees on April 8, 1974, was violative of Section 8 (a) (5) of the Act. Such action by the Respondent clearly and directly underminded the very nature of the objective and effectiveness of an exclusive bargaining representative (the Union), comparable to the action taken by the employer in Cf. *Wine Products Manufacturing Corp.*, 198 NLRB No. 90 (1972), cited by counsel for the General Counsel. The permanent replacement of the employees herein constituted not only an illegal discharge of the employees but for all practical purposes, a withdrawal of recognition of their duly elected collective-bargaining representative. Consequently, although Respondent met with the bargaining committee subsequent to the hiring of the permanent replacements, such meetings or bargaining can hardly be characterized as meanful bargaining in good faith. In reality, it was bargaining in bad faith or refusing to bargain on the part of the Respondent.

Although some employees testified that they overheard a conversation or statement by Mr. Weil or other company officials about being sorry for some of the employees, I do not attribute any significant weight to such testimony because the substance thereof is too vague and speculative to be of meaningful probative value, in assessing Respondent's motives for the lockout or its good faith bargaining prior to the lockout.

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[11] I considered the possibility that Respondent's acknowledgement or actual hiring of permanent replacements, might be merely a tactical maneuver. However, I cannot ignore the Respondent's (Mr. Wells) undisputed sworne testimony that it has hired permanent replacements for its unit employees when nothing in the record suggests otherwise.

The parties agree that the following constitute the appropriate bargaining unit:

> All production, maintenance, shipping, receiving, laboratory, and plant clerical employees employed by Respondent at its New Orleans, Louisiana, plant; excluding all office clerical employees, professional employees, administrative employees, technical employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

IV. The Effects of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices warranting a remedial Order, I shall recommend that it cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

It having been found that Respondent interfered with, restrained and coerced its entire complement of unit employees in the exercise of their Section 7 protected rights, in violation of Section 8(a)(1) of the Act; that it discriminatorily replaced or discharged the entire complement of its unit production employees in violation of Section 8(a)(3) of the Act; and that by its discrimina-

tory displacement of said employees it withdrew recognition of the Union in violation of Section 8(a)(5) of the Act, the recommended Order will provide that Respondent offer them reinstatement to their jobs, and make them whole for loss of any earnings within the meaning and in accord with the Board's decisions in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716, except as specifically modified by the wording of such recommended Order.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that Respondent cease and desist from or in any manner interfering with, restraining and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4).

Upon the basis of the above finding of fact and upon the entire record in this case, I make the following:

Conclusions of Law

1. The Johns-Manville Products Corporation, the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Oil, Chemical and Atomic Workers International Union, AFL-CIO, is and has been at all times material herein, a labor organization within the meaning of the Act.

3. By discriminating in regard to the tenure of employment of its entire complement of unit production employees, thereby in an effort to discourage membership in the Union, a labor organization, Respondent has engaged in unfair labor practices condemned by Section 8(a)(3) and (1), of the Act.

4. The discriminatory replacement of its entire complement of unit employees on April 8, 1974, the Respondent in effect withdrew recognition of and undermined the objective and effectiveness of the Union as the duly elected collective-bargaining representative of its unit employees, in violation of Section 8(a)(5) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. All production, maintenance, shipping, receiving, laboratory, and plant clerical employees employed by Respondent at its New Orleans, Louisiana, plant; excluding all office clerical employees, professional employees, administrative employees, technical employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[12]

ORDER

The Johns-Manville Products Corporation, Respondent herein, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees in regard to hire or tenure of employment, or

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[12] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

any term or condition of employment because of protected concerted activities.

(b) In any other manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act except to the extent that such rights may be effected by lawful agreements in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to its entire complement of locked out unit employees immediate and full reinstatement to their former positions as held by them on April 8, 1974, or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights previously enjoyed, and make them whole for any loss of pay suffered by reason of the discrimination against them with interest at the rate of 6 percent, in the manner described in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of the recommended Order.

(c) Upon request, bargain with Oil, Chemical and Atomic Workers International Union, AFL-CIO, as the exclusive representative of Respondent's employees in the unit herein found appropriate and embody any understanding reached in a signed agreement.

(d) Post at Respondent's plant at New Orleans, Louisiana, copies of the attached notice marked "Appendix." [13]

[13] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading

Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondent's representatives, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director for Region 15, in writing, within 20 days from the date of receipt of this Order, what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C.

/s/ Elbert D. Gadsden
ELBERT D. GADSDEN
Administrative Law Judge

"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[SEAL] NOTICE TO EMPLOYEES [SEAL]
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT discourage membership in OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, or any other labor organization, by discharging employees or otherwise discriminating in any manner in respect to their tenure of employment or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise and enjoyment of rights guaranteed to them by Section 7 of the National Labor Relations Act, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a) (3) of the Act.

WE WILL offer all locked out unit employees, immediate and full reinstatement to their former positions, which they held on April 8, 1974, or if such positions no longer exist, to substantially equivalent positions, without prejudice to the seniority and other rights and privileges previously enjoyed by them, and make them whole for any loss of pay they may have suffered by reason of their replacement or discharge, with interest at the rate of 6 percent per annum.

WE WILL NOT refuse to bargain collectively with OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, by permanently replacing employees or by refusing to meet with it timely upon its request.

WE WILL, upon request, bargain collectively in good faith with OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, as the exclusive

bargaining representative of all the employees in the bargaining unit herein found appropriate, and to reduce to a written, signed contract any agreement reached as the result of such bargaining.

The appropriate bargaining unit is composed of all production, maintenance, shipping, receiving, laboratory and plant clerical employees employed by Respondent at its New Orleans, Louisiana, plant; excluding all office clerical employees, professional employees, administrative employees, technical employees and supervisors as defined in the Act.

All our employees are free to become, remain, or refuse to become or remain, members of said Union or any other labor organization, except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a) (3) of the Act.

JOHNS-MANVILLE PRODUCTS CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

_____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Plaza Tower, Suite 2700, 1001 Howard Avenue, New Orleans, Louisiana 70113 (Tel. No. 504-589-6361).